

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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-
- 1. Elected and took office 11-30-88 to replace L. Bradford Tillery who retired 8-1-88.
 - 2. Elected to new position and sworn in 1-1-89.
 - 3. Elected to new position and sworn in 1-1-89.
 - 4. Elected to new position and sworn in 1-1-89.
 - 5. Elected to new position and sworn in 1-3-89.
 - 6. Elected to new position and sworn in 1-1-89.
 - 7. Appointed 2-7-89 to replace Thomas H. Lee who retired 12-31-88.
 - 8. Elected to new position and sworn in 1-1-89.
 - 9. Elected to new position and sworn in 1-1-89.
 - 10. Elected to new position and sworn in 1-2-89.
 - 11. Elected and took office 1-3-89 to replace Ralph Walker who retired 12-30-88.
 - 12. Elected to new position and sworn in 1-1-89.
 - 13. Appointed 12-1-88 to replace Robert A. Collier, Jr. who retired 7-31-88.
 - 14. Elected to new position and sworn in 1-1-89.
 - 15. Elected to new position and sworn in 1-1-89.

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-
1. Elected to new position and sworn in 12-5-88.
 2. Elected and sworn in 12-5-88 to replace J. Randal Hunter.
 3. Elected to new position and sworn in 12-5-88.
 4. Elected to new position and sworn in 12-5-88.
 5. Elected and sworn in 12-5-88 to replace Ben U. Allen who retired 12-5-88.
 6. Elected to new position and sworn in 12-5-88.
 7. Appointed and took oath 3-10-89 to replace George L. Greene who took office on Superior Court 1-1-89.
 8. Appointed Chief Judge 12-1-88 to replace Elton Pridgen who retired 11-30-88.
 9. Elected to new position and sworn in 12-5-88.
 10. Elected and sworn in 12-5-88 to replace William A. Christian who became Chief Judge.
 11. Appointed 11-7-88 to replace Lacy S. Hair who retired 10-31-88.
 12. Appointed 3-15-89 to replace Orlando F. Hudson, Jr. who took office on the Superior Court 1-1-89.
 13. Appointed Chief Judge in new district and sworn in 1-1-89.
 14. Deceased 4-19-89.
 15. Elected to new position and sworn in 12-5-88.
 16. Elected and sworn in 12-5-88 to replace Adelaide G. Behan who did not seek reelection.
 17. Appointed Chief Judge 12-5-88 to replace Paul Williams.
 18. Elected and sworn in 12-5-88 to replace J. Bruce Morton who became Chief Judge 12-5-88.
 19. Elected to new position and sworn in 12-5-88.
 20. Elected to new position and sworn in 12-5-88.
 21. Elected to new position and sworn in 12-5-88.
 22. Appointed Chief Judge 12-1-88 to replace Lester P. Martin, Jr. who took office on Superior Court 1-1-89.
 23. Appointed 1-22-89 to replace Robert W. Johnson who became Chief Judge.
 24. Appointed 9-21-88 to replace Stewart L. Cloer who resigned 8-26-88. Elected to new position and sworn in 12-5-88.
 25. Appointed 2-1-89 to replace Nancy L. Einstein.
 26. Elected to new position and sworn in 1-1-89.
 27. Appointed 3-3-89 to replace T. Patrick Matus III who resigned 12-31-88.
 28. Elected and sworn in 12-5-88 to replace Shirley Fulton who took office on Superior Court 1-1-89.
 29. Elected and sworn in 12-5-88 to replace Berlin H. Carpenter, Jr. who did not seek reelection.
 30. Appointed Chief Judge 12-5-88.
 31. Elected and sworn in 12-5-88 to replace Loto Greenlee who became Chief Judge.
 32. Elected and sworn in 12-5-88 to replace Zoro J. Guice, Jr.

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

LOUIS R. WARFIELD AND ELIZABETH G. WARFIELD v. CLIFTON HICKS, INDIVIDUALLY, AND CLIFTON HICKS BUILDERS, INCORPORATED

No. 8710SC970

(Filed 2 August 1988)

1. Fraud § 12.1— insufficient evidence of intent to deceive

Evidence that defendant builder told plaintiffs the use of beetle infested decorative beams in a house being constructed for plaintiffs would pose no problems other than a little sawdust was insufficient to support a claim for fraud since the evidence did not support an inference that defendant intended to deceive or mislead plaintiffs.

2. Unfair Competition § 1— builder's representation not unfair trade practice

An alleged representation by defendant builder that the use of beetle infested decorative beams in a house being constructed for plaintiffs would pose no problems other than a little sawdust does not rise to the level of oppressive, unscrupulous or deceptive conduct which would constitute an unfair or deceptive act or practice within the purview of N.C.G.S. § 75-1.1.

3. Negligence § 2; Vendor and Purchaser § 6.1— negligent construction—issue improperly submitted

The trial court erred in submitting an issue as to negligent construction of a house to the jury where plaintiffs neither alleged nor proved any injury other than the injury to the property itself arising from defendant builder's alleged failure to adequately perform its contract or to satisfy express and implied warranties.

4. Appeal and Error § 62.1— new trial on liability and damages issues

A new trial is awarded not only on issues of damages but also on the merits of plaintiffs' claims for breach of contract and warranties in the con-

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struction of a house where the jury at the first trial failed properly to apply the court's instructions with respect to damages; the evidence was insufficient to support submitted issues as to negligence, fraud and unfair trade practices; and the erroneous submission of those issues may have affected the jury's verdict on the breach of contract and warranty issues which were correctly submitted.

5. Contracts § 29; Sales § 19— house construction—breach of contract and warranty—measure of damages—jury decision

In an action for breach of contract and breach of warranty in the construction of a house, the jury should have been allowed to determine whether the proper measure of damages was diminished value or cost of repairs based on its finding as to whether a substantial portion of the work would have to be undone.

6. Contracts § 21.2; Vendor and Purchaser § 6.1— breach of construction contract and warranty—value evidence

In an action for breach of contract and breach of warranty in the construction of a house, an appraisal of the house in December 1986 should have been excluded where plaintiffs obtained possession of the house in 1983, since values are to be determined as of the date of tender or delivery of possession to the owner.

7. Appeal and Error § 25— improper cross-assignment of error

The appellate court was without jurisdiction to determine a cross-assignment of error constituting an attack on a portion of the trial court's judgment since this argument could properly be raised only by notice of cross-appeal.

APPEAL by defendants from *B. Craig Ellis, Judge*. Judgment entered 31 March 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 2 March 1988.

Barringer, Allen & Pinnix, by William D. Harazin and C. Lynn Calder, for plaintiff-appellees.

Kirk, Gay, Kirk, Gwynn & Howell, by Philip G. Kirk and Joseph T. Howell, for defendant-appellants.

BECTON, Judge.

This action arises from a contract for construction of a custom home. Plaintiffs, Louis R. and Elizabeth G. Warfield, filed suit against Clifton Hicks Builders, Incorporated (CHB) and Clifton Hicks individually, seeking compensatory and punitive damages based on claims of breach of contract, breach of express and implied warranties, misrepresentation, fraud, and negligence. The

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Warfields also alleged that certain conduct of defendants constituted unfair and deceptive trade practices or acts within the meaning of N.C. Gen. Stat. Sec. 75-1.1, entitling them to treble damages and attorneys fees. From a judgment awarding plaintiffs \$27,200, defendants appeal. We reverse and remand for a new trial.

I

The evidence at trial showed that in January 1983, defendant Hicks, president of CHB, quoted to Mr. and Mrs. Warfield a price of \$208,000 for the construction of a house, based on a set of preliminary blueprints, photographs, and a handwritten "spec" sheet provided by the Warfields. On 8 February 1983, the parties executed an Offer to Purchase and Contract which included the lot and construction of the house for \$208,000. On 10 February, before the preparation of final plans by an architect was completed, the parties executed a standard form construction contract which included specifications for various materials to be used in construction and which provided that any changes would be accompanied by a change order signed by both parties.

During construction, disputes arose between the builder and the Warfields over numerous aspects of the building. Various changes instigated by either Mr. Hicks or the Warfields were evidenced by change orders which reflected either the increase or reduction in cost to the Warfields resulting from each change. On 8 September 1983, before construction was fully completed, a closing on the house was held at a final price of \$214,837.54. At that time, CHB, through Mr. Hicks, executed a one-year express warranty on the construction of the house and an agreement to complete within thirty days a "punchlist" of items requiring completion or repairs.

The Warfields contested some of the change orders at trial, contending that certain items were included in the original plans and should not have been denominated "extras," and that Mr. Warfield felt coerced into signing the orders by financial pressures and fear of delays in construction. They also introduced evidence that some of the punchlist items were never completed and that various other defects or problems discovered during the warranty period were not remedied by the builder, despite his representations that they would be.

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One major dispute between the parties concerned the installation of decorative beams in the kitchen and family room. The Warfields presented evidence that Mr. Hicks refused to install "heavy hand-hewn beams" as called for in the original specifications but offered to substitute old beams from a tobacco barn which were available from George Butts in Fuquay-Varina. At Hicks' suggestion, Mr. Warfield viewed the beams and was satisfied with their appearance but was told by Mr. Butts that they were full of worm holes and could not be used for structural purposes, and that there "might be a couple of beetles in the beams." When Mr. Warfield questioned Mr. Hicks about whether the beetles would be a problem, Mr. Hicks responded "... these won't be a problem to you. They'll just make some sawdust." With Mr. Warfield's approval, Mr. Hicks personally installed the beams. Thereafter, the Warfields experienced problems with sawdust and a scratching noise, and learned, in the spring of 1984, that the problems were due to an active infestation of the beams by old house bores and powder post beetles. They also learned that the house could not pass a pest inspection and that, as a consequence, it potentially would be difficult for them or future buyers to obtain financing on the house.

Mr. Hicks testified that he told the Warfields early in their negotiations that he could not provide hand-hewn beams, that he was unaware until the spring of 1984 that the old beams used were infested with wood-boring insects, and that at that time he inquired of a college professor what problems might arise from the infestation. Based on what he was told, he informed Mr. Warfield in late spring or early summer that the beetles posed no threat to the house's structural integrity and that the only bother to him would be the possibility of some dust.

Evidence was also offered by the Warfields that an inspection of their home by an expert in July of 1986 revealed numerous items which were incomplete, below normal construction standards, or in violation of the building code. At least one witness testified concerning the costs of remedying the defective conditions, and a December 1986 appraisal showed a \$35,000 lessened value of the house due to defects existing at that time.

At the conclusion of the plaintiffs' evidence, the trial court granted defendant Hicks' motion for a directed verdict on all is-

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sues except fraud, misrepresentation, and unfair and deceptive trade practices. The court denied motions for directed verdict by the corporation and by the plaintiffs made at the close of the plaintiffs' evidence and renewed at the conclusion of all the evidence.

Sixteen issues were submitted to the jury and were answered as follows:

- 1) Did the defendant Clifton Hicks Builders, Inc. breach the contract between it and the plaintiffs?

Answer: No

- 2) In what amount, if any, have the plaintiffs been damaged by the failure of the defendant Clifton Hicks Builders, Inc. to perform fully?

Answer: None

- 3) Did the defendant Clifton Hicks Builders, Inc. breach the express warranty given to the plaintiffs?

Answer: Yes

- 4) In what amount, if any, have the plaintiffs been damaged by the breach of the express warranty?

Answer: 2,300

- 5) Did the defendant Clifton Hicks Builders, Inc. construct the plaintiffs' dwelling in a negligent manner?

Answer: Yes

- 6) In what amount, if any, have the plaintiffs been damaged by the negligence of the defendant Clifton Hicks Builders, Inc.?

Answer: 0

- 7) Did the defendant Clifton Hicks Builders, Inc. breach an implied warranty of workmanlike quality to the plaintiffs regarding the new dwelling?

Answer: Yes

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- 8) In what amount, if any, have the plaintiffs been damaged by the breach of an implied warranty of workmanlike quality by the defendant Clifton Hicks Builders, Inc.?

Answer: 0

- 9) Did the defendants Clifton Hicks and Clifton Hicks Builders, Inc. fraudulently misrepresent that the wood beams installed in the plaintiffs' dwelling would present no problem to the plaintiffs?

Answer: No

- 10) What amount, if any, have the plaintiffs been damaged by the fraudulent misrepresentation of the defendants Clifton Hicks and Clifton Hicks Builders, Inc.?

Answer: N/A

- 11) In your discretion, what amount of punitive damages, if any, should be awarded to the plaintiffs?

Answer: N/A

- 12) Did the defendants Clifton Hicks and Clifton Hicks Builders, Inc. represent to the plaintiffs that the wood beams would present no greater problem than a little sawdust, and the defendants knew or should have known that the beams were infested with beetles and would not pass a pest inspection thus causing great difficulty to the plaintiffs in selling or refinancing the dwelling?

Answer: Yes

- 13) Was the defendants Clifton Hicks and Clifton Hicks Builders, Inc. conduct in commerce or did it affect commerce?

Answer: Yes

- 14) Was the defendants Clifton Hicks and Clifton Hicks Builders, Inc. conduct a proximate cause of the plaintiffs' injury?

Answer: Yes

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15) By what amount, if any, have the plaintiffs been injured?

Answer: 8,300

16) What is the amount of damages, if any, due to the plaintiffs without being duplicative?

Answer: 6,400

After the jury returned its verdict, the Warfields moved for judgment notwithstanding the verdict or in the alternative for a new trial, on the damages issue, and defendants moved for a judgment notwithstanding the verdict setting aside Issues Nos. 5, 12, and 15. The trial court denied the motions but set aside the jury's answer to Issue No. 16 as inconsistent with the instructions given. The court entered judgment against defendants for \$2,300 plus \$8,300 pursuant to the jury verdict on Issues Nos. 4, 12, 13, 14, and 15; trebled the \$8,300 pursuant to N.C. Gen. Stat. Sec. 75-16; and denied attorneys fees.

The issues on appeal relate to the admission of evidence, the jury instructions on damages, and various aspects of the trial court's rulings on motions by both parties for directed verdict and judgment notwithstanding the verdict.

II

Defendants' first contention—that the trial court erred by denying their motions for directed verdict and for judgment notwithstanding the verdict with respect to the issue of unfair or deceptive trade practices—presents the question whether the evidence, considered in the light most favorable to the plaintiffs, was sufficient to show that the individual and corporate defendants violated N.C. Gen. Stat. Sec. 75-1.1 in their business dealings with the Warfields. *See Abernathy v. Ralph Squires Realty Co.*, 55 N.C. App. 354, 285 S.E. 2d 325 (1982). The Warfields maintain that Mr. Hicks' representation to them that the beetle infestation of the ceiling beams would pose no problems other than a little saw-dust amounts to an unfair and deceptive act because the statement had the capacity or tendency to deceive.

[1] Although the parties have not raised the question, we must first consider whether there was sufficient evidence to submit to the jury the issue of fraudulent misrepresentation, since proof of fraud necessarily constitutes proof of a violation of the statutory

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prohibition against unfair and deceptive acts. *See Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 97, 331 S.E. 2d 677, 681 (1985); *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E. 2d 342, 346 (1975). To make out a case of actionable fraud, plaintiffs must show that: (1) Mr. Hicks made a representation relating to some material past or existing fact; (2) the representation was false; (3) Mr. Hicks knew it was false or made it recklessly and as a positive assertion; (4) Mr. Hicks made the representation with the intention that it be acted upon by the Warfields; (5) the Warfields reasonably relied upon the representation and acted upon it; and (6) they suffered injury. *E.g., Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980). Moreover, the false representation must have been definite and specific. *Rosenthal v. Perkins*, 42 N.C. App. 449, 451, 257 S.E. 2d 63, 65 (1979).

All of the elements of fraud were not present in this case. In our view, the plaintiffs' evidence taken in the most favorable light shows merely that Mr. Hicks made a general unspecific statement of opinion about the potential future consequences of using beetle infested beams and does not support a reasonable inference that he intended to deceive or mislead the Warfields. Accordingly, we conclude the issue of fraud, represented by Issues Nos. 9, 10, and 11, should not have been submitted to the jury.

[2] We next consider whether, absent fraud, the evidence of Mr. Hicks' statements about the beams is otherwise adequate to support a conclusion that he violated N.C. Gen. Stat. Sec. 75-1.1(a), which declares unlawful "unfair or deceptive acts or practices in or affecting commerce." In *Johnson v. Phoenix Mutual Life Ins. Co.*, our Supreme Court asserted the general principle that "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* at 263, 266 S.E. 2d at 621. In essence, "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *Id.* at 264, 266 S.E. 2d at 622. The concept of "unfairness" is broader than and includes the concept of "deception." *Id.* at 263, 266 S.E. 2d at 621. An act or practice is deceptive "if it has the capacity or tendency to deceive." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E. 2d 397, 403 (1981). The facts surrounding the particular transaction and the impact the practice has in the marketplace determine whether a par-

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ticular act is unfair or deceptive. *Id.; Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 314 S.E. 2d 582, 584, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984). Further, “[i]n determining whether a representation is deceptive, its effect on the average consumer is considered.” *Johnson* at 265-66, 266 S.E. 2d at 622.

In the present case, the Warfields presented testimony of Mr. Butts that he had told both defendant Hicks and the Warfields that the beams “had been infested at one time or another” with beetles. Mr. Warfield testified that when he asked Hicks about the matter, Hicks merely responded that he had had an old piece of furniture in his house for years that had dust beetles in it, that they just made a little bit of sawdust, and that the beetles were not a problem. Applying the foregoing criteria to these facts, we find that the alleged representation by Mr. Hicks simply does not rise to the level of oppressive, unscrupulous, or deceptive conduct which would constitute an unfair or deceptive act or practice within the intended purview of N.C. Gen. Stat. Sec. 75-1.1. Nor does our review of the record disclose the existence of any other facts which would establish a violation of the statute. We therefore hold that the submission to the jury of the claim of unfair and deceptive trade practices, represented by Issues Nos. 12, 13, 14, and 15, was error.

Defendants also assign error to the specific wording of Issue No. 12. Having concluded that this issue should not have gone to the jury, we need not address the arguments relating to this assignment of error.

III

[3] Defendants next contend that the trial court erred by denying the corporate defendant's motions for directed verdict and for judgment notwithstanding the verdict on the issue of negligence. We agree that the facts of this case do not support a claim for negligent construction of the house.

In our opinion, our Supreme Court's decision in *North Carolina Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978) controls the resolution of this issue. Setting forth the principle that “[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor,”

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id. at 81, 240 S.E. 2d at 350, the Court held that negligence was not a proper basis of recovery for an alleged failure of the defendant contractor to properly install a roof in accordance with its contract. Although the Court enumerated several categories of exceptions in which a promisor might be held liable in tort for damages proximately caused by a negligent or willful act or omission in the course of performance of his contract, we conclude that the case at bar falls within none of them. The Warfields have neither alleged nor proven any injury other than the injury to the property itself arising from the contractor's alleged failure to adequately perform its contract or to satisfy express and implied warranties. We are convinced that, under these circumstances, as in *Ports Authority*, the Warfields' allegations of negligence were surplusage, and it thus was error to submit negligence to the jury as an additional basis for relief.

In so concluding, we reject the Warfields' contention that *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E. 2d 222 (1985) authorizes a negligence claim by any purchaser of a dwelling house against the builder for economic loss arising from faulty construction. In *Oates*, the Court did recognize, without discussing *Ports Authority*, that such a cause of action exists in favor of an owner who is *not the original purchaser*. However, nothing in that decision suggests an intent to overrule the Court's earlier holding in *Ports Authority* with respect to claims by the initial purchaser. We therefore presume that the Court intended to leave that holding intact, and to merely recognize a means of redress for those purchasers who suffer economic loss or damage from improper construction but who, because not in privity with the builder, have no basis for recovery in contract or warranty.

IV

[4] By another assignment of error, defendants challenge the damage award, contending the trial court erred by refusing to set aside the jury's answer to Issue No. 15. Both parties agree that the jury failed to understand or properly apply the judge's instructions with respect to damages, but disagree regarding the import of the jury's decisions on Issues Nos. 15 and 16, since No. 16 was intended by the trial judge to elicit a total figure for all claims, without duplication of damages. We conclude that a new trial is necessary to resolve the confusion.

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Further, we have already determined that the evidence in this case was inadequate to support claims of negligence, fraud, or unfair and deceptive trade practices. In light of the complexity of the case and the overlapping nature of many of the Warfields' claims for relief, we cannot say that the erroneous submission of nine superfluous issues to the jury did not affect the verdict on the other liability issues which were correctly submitted. For this reason, we order the jury verdict and resulting judgment set aside in their entirieties and the case remanded for retrial, not merely on the damages question but also on the merits of the Warfields' claims of breach of contract and of express and implied warranties.

V

Having ordered a new trial, we briefly address a remaining issue concerning damages which may arise upon retrial. Defendants assign error to the trial court's admission in evidence of an appraisal report concerning the value of the Warfields' home as of December 1986, which was offered by the Warfields as evidence of the diminished value of the house resulting from the defendants' alleged breach of the implied warranty of workmanlike construction. By cross-assignment of error, the Warfields argue that the trial court erred by failing to instruct the jury on "diminished value" as an alternative measure of damages.

[5] There are two methods of measuring damages for defects or omissions in construction which constitute either a breach of warranty or breach of contract: (1) the difference between the value of the building as warranted or contracted for and its value as actually built, and (2) the cost of repairs required to bring the property into compliance with the warranty or contract. *E.g., Gaito v. Auman*, 313 N.C. 243, 327 S.E. 2d 870 (1985); *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974); *Robbins v. C. W. Myers Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884 (1960). The first method is used when a substantial part of the work must be redone in order to comply with the contract or warranty, resulting in economic waste, while the second method is generally applied when the defects can be corrected without substantial destruction of any part of the house. *E.g., Gaito; Robbins; Stiles v. Charles M. Morgan Co.*, 64 N.C. App. 328, 307 S.E. 2d 409 (1983). Ordinarily, the trier of fact must determine which measure of damages is ap-

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plicable based on its finding as to whether a substantial portion of the work would have to be undone. *See Stiles* at 381, 307 S.E. 2d at 412; *LaGasse v. Gardner*, 60 N.C. App. 165, 169-70, 298 S.E. 2d 393, 396 (1982). Consequently, upon retrial, the jury should be allowed to determine the proper measure of damages.

[6] With regard to defendant's argument that the appraisal evidence was inadmissible, we conclude that, because the evidence only concerned the diminished value of the house in December 1986, it should have been excluded. As the Supreme Court said in *Robbins*, and reiterated in *Gaito*, when a diminished value measure of damages is applied, "the values [are] to be determined as of the date of tender or delivery of possession to the owner." *Robbins* at 666, 111 S.E. 2d at 887; *Gaito* at 253, 327 S.E. 2d at 878.

VI

[7] Finally, we summarily dismiss the Warfields' contention, made by way of cross-assignment of error, that the trial court erred by granting defendant Hicks' motion for directed verdict on the issues of breach of contract, breach of express and implied warranties, and negligence. This argument constitutes an attack on a portion of the trial court's judgment and could properly be raised only by notice of cross-appeal. Consequently, this Court is without jurisdiction to address the question sought to be presented. *See Stevenson v. N.C. Dept. of Insurance*, 45 N.C. App. 53, 262 S.E. 2d 378 (1980).

VII

In conclusion, we set aside the jury's verdict in its entirety, reverse the judgment of the trial court entered thereon, and remand this matter to the trial court for a trial *de novo* in accordance with this opinion.

Reversed and remanded.

Judges ARNOLD and PARKER concur.

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LINDA T. McDONALD D/B/A COUNTRY MEMORIES AND THE LINDA MC COMPANY v. DARRELL SCARBORO, AMTEK, INC. D/B/A AMERICAN CRAFTS AND W. GARDNER McCRARY

No. 8726SC952

(Filed 2 August 1988)

1. Unfair Competition § 1— tortious interference with business or contractual relations—unfair trade practice

The trial court did not err by finding as a matter of law that defendants had violated N.C.G.S. § 75-1.1(a) by their tortious interference with the business relations of plaintiff where plaintiff had entered into an agreement with defendant Scarboro under which Scarboro was to create new and original sculptures exclusively for plaintiff which plaintiff would manufacture and sell; plaintiff was not successful at having the sculptures reproduced and defendant Scarboro received no payment for first quarter 1985 sales; defendant McCrary entered into an agreement with Scarboro for Scarboro to become an employee of Amtek and produce sculptures for that company; Scarboro approached plaintiff and informed her that he wanted out of the contract; plaintiff stated her willingness to work with the unnamed men who had approached plaintiff, allowing them to make the reproductions while she sold Scarboro's work; no agreement was reached and Scarboro informed plaintiff that he no longer considered their contract valid; and Scarboro went to work for Amtek and continued to work until he was enjoined from doing so.

2. Contracts § 34— wrongful inducement to breach contract and interference with contract—evidence sufficient

The trial court did not err by denying defendant's Rule 50 motion to dismiss plaintiff's claims of wrongful inducement and interference with contract where there was no evidence of oppression or fraud, and the evidence viewed in the light most favorable to plaintiff reveals that plaintiff understood that the prior contract had been terminated and had no knowledge that her agreement with defendant may have been inconsistent with or involved a breach of the prior contract.

3. Attorneys at Law § 9— indemnification of attorney's fees—evidence of contract sufficient—award of fees improper

The trial court did not err in a breach of contract action by denying defendant McCrary's Rule 50 motion on the issue of defendant's indemnification of defendant Scarboro's attorney's fees but did err in its award of \$12,090 in attorney's fees. While there was sufficient evidence to establish the existence of an implied in fact contract, the jury should have been allowed to determine whether defendant breached the contract and the amount of damages.

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4. Attorneys at Law § 7.5— unfair trade practice—award of attorney's fees to plaintiff—amount proper

The trial court did not abuse its discretion in awarding plaintiff attorney's fees in the amount of \$27,686.10 in an unfair trade practice action where the court made appropriate findings of fact. N.C.G.S. § 75-16.1.

Chief Judge HEDRICK concurs in the result.

APPEAL by defendant from *Burroughs, Robert M., Judge.* Judgment entered 6 March 1987. Heard in the Court of Appeals 7 March 1988.

Petree Stockton & Robinson, by David B. Hamilton and J. Neil Robinson, for plaintiff-appellee.

Kenneth P. Andresen for defendant-appellant, W. Gardner McCrary.

No brief filed by defendants Darrell Scarboro or Amtek, Inc., d/b/a American Crafts.

JOHNSON, Judge.

This is a civil action brought by plaintiff against defendants for breach of contract, tortious interference with contract and business relations, common law unfair competition, violation of G.S. 75-1.1, civil conspiracy and conversion.

The plaintiff, Linda McDonald, operates two sole proprietorships which manufacture, market, sell and distribute a variety of folk art. Plaintiff sells not only the products she manufactures, but also sells on a commission basis the products of other folk artists.

Defendant, Darrell Scarboro, is an artist, who is able to create a variety of figurines or sculptures in folk art. In the fall of 1984, Scarboro called plaintiff and requested that she agree to sell his folk art, which consisted of the figurines. On 6 December 1984, Scarboro met plaintiff at his residence and he showed her several pieces of his work. Plaintiff indicated to defendant that she was in the business of marketing folk art and that she could sell reproductions of his work, although she didn't manufacture it. Defendant informed plaintiff that he had a contract with Robert Stovall to produce his work. However, he informed her that he had terminated the contract with Stovall on 13 September 1984. According to the terms of the contract, the scheduled termination date was to be on 2 January 1985. Also, plaintiff and defendant dis-

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cussed problems that Stovall encountered in having molds made from which satisfactory reproductions of Scarboro's work could be produced.

They also discussed the number of pieces defendant would be required to produce under the proposed agreement. Plaintiff agreed to pay for all manufacturing, to pay defendant a standard commission of 15% on each sculpture, and to lend defendant \$1,000.00, provided he repaid the loan within one year. After having several discussions, the parties reduced the agreement to writing.

On 26 December 1984, McDonald and Scarboro executed a contract for a term of five years. Pursuant to the contract, Scarboro assigned to plaintiff "all of the right, title and interest, including all copyrights" in the sculptures created. The contract also required defendant (Scarboro) to "create new and original sculptures exclusively" for plaintiff. Plaintiff agreed to pay Scarboro 15% of the net sales price of all reproductions of Scarboro's sculptures she sold. Also, plaintiff was required to make quarterly accountings to Scarboro and to submit payment for his portion of the "net sales" of the previous quarter.

Pursuant to contract specifications, Scarboro provided eight sculptures to plaintiff during the first calendar quarter. Plaintiff attempted to have the sculptures reproduced at a ceramics shop which Scarboro recommended, but was unsuccessful. The ceramics shop completed the molds unsatisfactorily, and as a result plaintiff was unable to fill the orders she received at an Atlanta trade show totalling \$15,000.00. Scarboro therefore received no payment for first quarter 1985 sales.

On 31 March 1985, defendant W. Gardner McCrary, owner and president of defendant Amtek, Inc. d/b/a American Crafts, saw some of Scarboro's work at a trade show in Charlotte, North Carolina. Alta Paxton was displaying the sculptures and informed him that Scarboro was the artist, and that Stovall reproduced them and was the sales agent. Later that day, McCrary met Scarboro at the trade show. McCrary met Scarboro again later that evening at Scarboro's residence where they discussed the possibility of his reproducing Scarboro's work.

In April of 1985, McCrary and Scarboro met at McCrary's place of business. Scarboro informed McCrary that he had signed

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a contract with McDonald and showed him a copy of the contract. McCrary told Scarboro that he would take the contract to the company lawyer to determine whether Scarboro was bound by the agreement. To prevent any bias, they received a second opinion from an outside lawyer concerning the contract's validity. As a result of those two opinions, McCrary and Scarboro further discussed an employment arrangement whereby Scarboro would become an employee of Amtek, would work at Amtek for \$245.00 per week with related benefits, would produce sculptures for the company which would belong to the company and would be paid 15% of the gross sales of his work. Also, McCrary informed Scarboro that he would pay Scarboro's attorney fees as "protection" if Scarboro were sued for breach of contract.

During this time, Scarboro approached McDonald and informed her that he "wanted to get out" of the contract. He also informed her that he had been approached by some men who could make the reproduction molds themselves; that they wanted to give him a place to work and to sculpt and that they would pay him a salary. In response, McDonald stated her willingness to work with these unnamed men, and offered to allow them to make reproductions while she sold Scarboro's work. No agreement was reached concerning this proposition.

In early April 1985, Scarboro informed McDonald by telephone that he no longer considered their contract valid, that he needed a job, that she had experienced too many problems getting his art reproduced, and that he needed to make a living. On 16 April 1985, Scarboro sent a letter to McDonald to the same effect.

On 22 April 1985, Scarboro began work at Amtek pursuant to the terms of their oral agreement. Scarboro provided Amtek with more than 20 original sculptures and continued to work until he was enjoined from doing so.

Plaintiff filed her complaint and motion for preliminary injunction on 26 June 1985 against defendants Scarboro, Amtek and McCrary. The objective of plaintiff's preliminary injunction was to have defendants terminate the selling of the sculptures and for defendants to return all original sculptures that Scarboro had made since his employment with Amtek. On 15 July 1985, the

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court granted plaintiff's preliminary injunction pursuant to the terms stated above.

On 3 September 1985, defendant Scarboro filed his answer, counterclaim and cross-claim. On 28 October 1985, defendants Amtek and McCrary filed their answer as well as a counterclaim against plaintiffs.

On 25 November 1985, plaintiff filed her reply to defendant Amtek's counterclaim. On 2 May 1986, defendant Scarboro filed his amended answer, counterclaim, and cross-claim against McCrary and Amtek for attorney fees. In addition, Scarboro filed a third-party complaint against plaintiff's husband, Bill McDonald. On 21 July 1986, plaintiffs filed answer to the third-party complaint, and a reply to Scarboro's amended counterclaim. On 2 March 1987, defendants Amtek and McCrary filed their replies to defendant Scarboro's counterclaim.

This cause came on for trial before a jury on 2 March 1987. Based upon the issues presented, the jury found, *inter alia*: (1) that Amtek and McCrary unjustifiably induced Scarboro to breach his contract with McDonald, (2) that Amtek and McCrary interfered with the business practice and business relations of McDonald, (3) that these actions were in, or affected commerce, and (4) that McDonald was injured as a proximate result of the conduct of Amtek and McCrary. The jury awarded damages in favor of McDonald and against all defendants. Furthermore, the jury found for Scarboro on his cross-claim against McCrary and Amtek for attorney fees.

After the verdict, the trial court concluded that the facts found by the jury constituted unfair or deceptive trade practices in or affecting commerce in violation of G.S. 75-1.1(a) and therefore trebled the damages and awarded McDonald attorney fees pursuant to G.S. 75-16.1.

From the jury's verdict and the trial court's conclusions and award, defendant McCrary appealed. No appeal was perfected by defendant Scarboro or defendant Amtek.

[1] By his first Assignment of Error, defendant presents an issue of first impression for this Court to resolve, to wit, whether tortious interference with business or contractual relations is a violation of G.S. 75-1.1.

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The overall purpose and legislative intent of G.S. 75-1.1 is "to declare deceptive acts or practices in the conduct of any trade or commerce in North Carolina unlawful, to provide civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State, and to enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer." *Hardy v. Toler*, 24 N.C. App. 625, 630-31, 211 S.E. 2d 809, 813, *modified on other grounds*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Furthermore, "[t]he statutes do not protect only individual consumers, but serve to protect business persons as well." *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 685, 340 S.E. 2d 755, 760 (1986) (citation omitted). Thus, disputes between competitors in business fall under the province of the statute. See *Harrington Manufacturing Co. v. Powell Manufacturing Co.*, 38 N.C. App. 393, 248 S.E. 2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E. 2d 469 (1979). Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has on the marketplace. *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 314 S.E. 2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984). Based upon the jury's findings of fact, the court must determine as a matter of law whether a defendant's conduct violates this section. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

No precise definition of "unfair methods of competition" as used in this section exists.

Unfair competition has been referred to in terms of conduct 'which a court of equity would consider unfair.' (Citation omitted.) Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others.

Harrington, supra at 400, 248 S.E. 2d at 744. Furthermore, "[t]he concept of 'unfairness' is broader than and includes the concept of 'deception.'" *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453,

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279 S.E. 2d 1, 7 (1981), quoting, *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980).

Unfair methods of competition have been found by this Court in actions involving competitive business relationships. In *Harrington, supra*, defendant's allegations that plaintiff incorporated into its automatic tobacco harvester a defoliator manufactured by defendant, and demonstrated this defoliator to potential customers as a product manufactured by plaintiff, was found to be similar to "passing off" of one's goods as those of a competitor and thus constituted an unfair method of competition.

In *United Artists Records, Inc. v. Eastern Tape Corp.*, 19 N.C. App. 207, 198 S.E. 2d 452, cert. denied, 284 N.C. 255, 200 S.E. 2d 653 (1973), this Court held that the defendants' appropriation of recording performances owned by plaintiff, by reproducing them on magnetic tapes for sale in competition with plaintiff's recording, constituted unfair competition. Furthermore, in *Pedwell v. First Union National Bank*, 51 N.C. App. 236, 275 S.E. 2d 565 (1981), this Court held that plaintiffs stated a claim under G.S. 75-1.1(a) by alleging that defendants conspired to defeat plaintiffs' real estate contract with one of the co-conspirators by having the other co-conspirator deny financing shortly before closing, when plaintiff could not timely obtain alternative financing.

Although federal court interpretations of state statutes are not binding on the North Carolina Courts, it is worthy to note that in *American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc.*, 575 F. Supp. 816 (W.D.N.C. 1983), that Court dealt with the precise issue under consideration in the case *sub judice*. In *American Craft*, the Court stated that "[f]rom a reading of all the cases on G.S. 75-1.1, it appears that a tortious interference with a contract could constitute an unfair method of competition or unfair acts within the meaning of the statute." *Id.* at 821. However, the Court in that case concluded that the facts did not constitute unfair competition because the plaintiff had an adequate remedy under traditional contract principles. The jury awarded ample damages to cover the loss and there was no showing of an unwarranted refusal by the defendant to pay the claim.

Taking into consideration the purposes of the statute and the analyses and holdings of the above-stated cases, we believe that the facts found by the court clearly support its conclusion that de-

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fendants Amtek and McCrary engaged in unfair or deceptive acts. Defendant McCrary's contention that his actions had no impact on consumers or the marketplace, that his conduct did not offend established public policy and that his actions were not immoral, unethical, oppressive, unscrupulous or deceptive is wholly misplaced.

In our view, using a competitor's product, as McCrary did to the benefit of his company, despite the "bad bargain" that resulted from Scarboro's previous dealings with plaintiff, does not justify defendant's actions and is patently unfair. To undermine a competitor's potentially lucrative business opportunity, by taking its source of new income from an employee under contract, while at the same time marketing its product as one's own, is both unfair and deceptive. It is akin to the "pirating" of plaintiff's product. *See, United Artists, supra.*

The public has been deceived into believing that Amtek is the employer of the folk artist who created this fine art, when in fact the defendant is under contract with McDonald, one of his competitors or potential competitors. It is noteworthy that plaintiff saw the potential of an advantageous relationship when she indicated to Scarboro that she could market and sell the product, that Scarboro could produce the art, and that Amtek could manufacture it. This relationship could most certainly have been advantageous to all. Yet, defendants did not make any attempt to contact McDonald to ascertain whether the marketing and manufacturing of Scarboro's sculptures could be a profitable venture. Instead they chose to "bust" the McDonald/Scarboro contract, hire defendant while still under that contract and market the very product to which Scarboro had assigned all his rights.

We believe that his conduct taken to its extreme would lead to a monopolistic system, whereby contracts would have no force or validity and the free flow of commerce, at least as far as competitors in specific businesses are concerned, would be eroded and eventually destroyed. We do not believe that this is pure speculation, for the very intent of the statute has this ideal in mind. The act is directed toward maintaining ethical standards in dealings between persons engaged in business and to promote good faith at all levels of commerce. *Hardy, supra.* Unfair methods of competition, which were exhibited by defendants Amtek and McCrary

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in the case *sub judice*, would not promote good faith at any level of commerce.

The trial court found as a matter of law that defendants had violated G.S. 75-1.1(a) by their tortious interference with the business relations of plaintiff. Thus, based upon the facts in the case *sub judice*, we believe that the trial court did not err in its judgment.

[2] By his next two Assignments of Error, defendant contends that the trial court erred in refusing to grant his Rule 50 motion to dismiss plaintiff's claims of wrongful inducement and interference. He asserts that McDonald's "contract" with Scarboro was not valid as a matter of law and that plaintiff has failed to sufficiently establish wrongful interference. In support of these contentions, defendant contends that the McDonald/Scarboro contract was oppressive, that McDonald fraudulently induced Scarboro to sign the contract, and that the McDonald/Scarboro contract was void because it was executed during the period of time in which Scarboro had a contract with Stovall. We find these arguments meritless.

Upon a motion for a directed verdict, all evidence which supports a plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving to plaintiff the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E. 2d 507 (1978).

As to defendant's contentions concerning the issues of oppression and fraud, we have carefully reviewed the record and find no evidence of oppression or fraud.

As to defendant's contention that the Stovall contract invalidated the McDonald/Scarboro contract, we believe it is based on contradictory evidence. The record reflects that Stovall indicated the contract terminated on 2 January 1985, whereas Scarboro indicated the contract terminated on 13 September 1984. Scarboro related the latter date to McDonald. Furthermore, McDonald testified that she did not see the Stovall contract and did not know of a later termination date until depositions were taken in this civil action in November 1985.

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We are guided by defendant's reference to 17 Am. Jur. 2d *Contracts* Section 187 (1964). It states that "[*k*nowledge on the part of the party seeking to recover on such an agreement that the agreement sued on was inconsistent with and involved a breach of a prior contract between one of the parties and a third person [is] the first prerequisite to a denial by the court of the validity and enforcement of the second agreement." Thus, viewing the evidence in the light most favorable to plaintiff, the evidence reveals that McDonald understood that the prior contract between Scarboro and Stovall had been terminated as of 13 September 1984 and had no knowledge that the agreement between her and Scarboro may have been inconsistent with or involved a breach of Scarboro's prior contract with Stovall. Thus, based on the evidence, it was not error for the trial court to deny defendants' motion.

[3] By his next Assignment of Error, defendant contends that the trial court erred when it denied his Rule 50 motion on the issue of McCrary's indemnification of Scarboro's attorney fees. He argues that there is insufficient evidence to show the existence of a contract for attorney fees, and in the alternative, that the trial judge awarded an improper amount of damages.

"A contract of indemnity need not be express; indemnity may be recovered if the evidence establishes an implied contract. In addition, a right to indemnity exists whenever one party is exposed to liability by the action of another who, in law or equity, should make good the loss of the other." 41 Am. Jur. 2d *Indemnity* Sec. 19 (1968). We believe the evidence was sufficient to establish the existence of an implied in fact contract. There was testimony elicited by Scarboro that defendant McCrary informed him that an attorney would be provided in the event he (Scarboro) was sued by McDonald. Scarboro's deposition testimony of the same import was also admitted.

The remaining issue on this assignment of error is whether the trial judge awarded an improper amount of attorney fees to defendant Scarboro. We believe the trial court erred. The jury answered in the affirmative to the question of whether defendants McCrary and/or Amtek represented that they would indemnify Scarboro for his attorney fees if sued by plaintiff McDonald. We believe that the jury, the trier of fact, should have been

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allowed to determine whether defendant breached the contract, and if so, the amount of damages to which he is entitled.

The only evidence submitted to the jury as to the amount of legal expenses incurred by defendant Scarboro was the amount of \$7,000.00. At the time of the trial, no bill had been submitted by Scarboro's present attorney. The affidavit submitted by Scarboro's attorney was not presented as evidence for the jury to consider. Since this was in fact an action on contract to recover attorney fees, we believe it was an issue for the jury to decide. Thus, the trial court erred when it awarded defendant Scarboro attorney fees in the amount of \$12,090.00.

[4] Defendant next contends that the trial court erred in granting plaintiff attorney fees in the amount of \$27,686.10 because such an amount is not a reasonable fee. Defendant contends the fee is unreasonable due to excessive interview conferences, excessive review of the files, excessive hourly rates and excessive copy charges. We disagree.

G.S. 75-16.1 authorizes the presiding judge to allow a *reasonable* attorney fee to the duly licensed attorney representing the prevailing party upon the finding of certain facts. Award or denial of such fees, even where supporting facts exist, is within the discretion of the trial judge. *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 337 S.E. 2d 616 (1985). We find no abuse of that discretion here. Furthermore, defendant contends that the court made no findings as to reasonableness of rates and hours in determining the reasonableness of the fee. We find no merit to this argument, because as per G.S. 75-16.1, the court made appropriate findings of fact as it was required to do. Thus, we find no error in the award of attorney fees.

As to defendant's remaining two Assignments of Error, we find them meritless and without need for discussion.

Finally, we note that defendant has not brought forward three of his assignments of error. We deem them abandoned and decline to review them. N.C.R. App. P., Rule 28(b).

Accordingly, for all the aforementioned reasons, we remand this case to the trial court for a jury determination on the proper amount of counsel fees to be awarded to defendant Scarboro, un-

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der the implied in fact contract, and affirm the remainder of the judgment.

Affirmed in part; remanded in part.

Judge ORR concurs.

Chief Judge HEDRICK concurs in the result.

STATE OF NORTH CAROLINA v. CLIFFORD H. EMERY

No. 8710SC449

(Filed 2 August 1988)

1. Criminal Law § 91.12— speedy trial—delay for pretrial motions

The defendant in a prosecution for second degree murder was not denied his right to a speedy trial under N.C.G.S. § 15A-701 by a delay of 474 days between indictment and trial where the time was within the 120-day limit after delays resulting from pending motions were excluded. Defendant did not dispute the State's evidence that the motions had been calendared on several occasions, presented no evidence showing that the delay in hearing the motions was caused solely by the State and failed to assert his right to a speedy trial at an earlier time or bring the pending motions to the court's attention.

2. Criminal Law § 34.1— other offenses—improperly admitted—prejudicial

The trial court erred in a prosecution for second degree murder by admitting evidence of other alleged crimes by defendant where, although evidence of defendant's sale of marijuana to the victim was relevant in showing a relationship between defendant and the victim and evidence that defendant sold marijuana and had once questioned a witness about whether the victim was a narc had some probative value concerning defendant's possible motive, evidence that defendant was in the business of selling marijuana to high school age persons, that defendant had traded marijuana for his car, the details of how marijuana was packaged and sold, and that defendant had loaded a gun during an unrelated breaking or entering was irrelevant and cumulatively prejudicial. N.C.G.S. § 8C-1, Rule 404(b).

Judge PHILLIPS concurs in the result.

APPEAL by defendant from *Bailey (James H. Pow), Judge*. Judgment entered 6 November 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 17 November 1987.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General John F. Maddrey and Assistant Attorney General Michael Rivers Morgan, for the State.

Brenton D. Adams and K. Lee McEniry for defendant-appellant.

GREENE, Judge.

This is a criminal action in which defendant was found guilty of second-degree murder and sentenced to fifty years in prison. Defendant assigns various errors which he argues entitle him to either dismissal of the charges or to a new trial.

The evidence at trial tended to show that the victim, Michael Young, age sixteen, and Robie Linton, age seventeen, went to defendant's house on 8 March 1985 around 5:00 p.m. Linton lived with defendant and defendant's girlfriend, Cheryl Lynn Hall. Linton, Young and defendant drank some beer and conversed while looking at a photograph album. After thirty to forty minutes, Linton went to a telephone near the den and called his girlfriend. From where he was talking on the phone, Linton could see defendant and Young in the den. Linton testified the victim was sitting in a chair and defendant was standing near the victim with a shotgun. Linton further testified defendant "was standing with the gun and he was talking about—covering it up or something, and he pulled it up like that, and when he pulled it up like that it went off and shot him in the chest . . ." Linton testified the barrel was about four inches from the victim when the gun discharged. Linton also testified the first thing defendant said after the shooting was that it was an accident. In addition, Linton testified that both he and defendant were upset. The two then placed Young's body in a car, and drove to a wooded area and buried the body, after which defendant said a prayer over the grave.

There was also extensive testimony concerning defendant's trafficking in marijuana and concerning a breaking and entering in which defendant participated the night before the shooting. As well, Linton testified defendant asked Linton's opinion on whether the victim was a "nark" on one occasion. The State also presented evidence showing the hammer on the shotgun had to be fully cocked and that the trigger had to be fully pulled back in

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order for the gun to fire. At the close of the State's evidence, defendant moved for a dismissal based upon the insufficiency of the evidence. The motion was denied and defendant rested without offering evidence. The jury was instructed on second-degree murder and involuntary manslaughter. After it finished deliberations, it returned a verdict of guilty as to second-degree murder.

The issues before us are: I) whether the trial court erred in denying defendant's motion to dismiss the action because defendant was not brought to trial within the time limits set out in the Speedy Trial Act; and II) whether defendant is entitled to a new trial because the trial court erred in admitting evidence of prior offenses allegedly committed by defendant.

I

[1] Defendant first argues his statutory right to a speedy trial was violated and therefore the trial court should have granted his motion to dismiss. The evidence before the trial judge indicated that defendant was arrested on 11 March 1985 and indicted on 24 June 1985. On 13 June 1985, 16 July 1985, and 28 October 1986, defendant filed various motions. The trial court did not hear these motions until 3 November 1986, some 474 days after defendant's indictment.

Section 15A-701(a)(1) (1983) of the North Carolina General Statutes requires that the trial of a defendant begin "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last . . ." Therefore, the 120-day time period began running on 24 June 1985, the date of defendant's indictment.

However, certain time periods are excluded in computing the 120 days. Among the exclusions are any periods of delay resulting from

[h]earings on any pretrial motions or the granting or denial of such motions.

The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on

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the motion or the event causing the delay is finally resolved
....

N.C.G.S. Sec. 15A-701(b)(1)(d).

Defendant's post-indictment motions on 16 July 1985 included motions for funds to hire an investigator, a ballistics expert, a fingerprint expert, a psychiatric social worker, a psychologist, a psychiatrist, and a parole and probation expert. On 28 October 1986, defendant filed the motion to dismiss for failure to bring him to trial in a timely manner along with several motions to exclude certain evidence. The trial court decided all these motions at a hearing on 3 November 1986 and denied defendant's motion to dismiss for failure to bring him to trial.

In *State v. Oliver*, 302 N.C. 28, 41, 274 S.E. 2d 183, 192 (1981), our Supreme Court stated:

While motions should be promptly calendared for hearing, both sides are entitled to a reasonable time within which to prepare. . . . Provided the motion is heard within a reasonable time after it is filed and the state does not delay the hearing for the purpose of thwarting the speedy trial statute, the time between the filing of the motion and its disposition is properly excluded in computing the time within which a trial must begin.

The defendant has the burden of proof on a motion to dismiss for failure to comply with the provisions of the Speedy Trial Act. N.C.G.S. Sec. 15A-703(a). However, the State has the burden of "going forward with evidence in connection with excluding periods from computation of time in determining whether or not the time limitations . . . have been complied with." *Id.*

The State presented evidence through an assistant district attorney who testified that the motions had been calendared several times since defendant's indictment but had been "held open for various reasons." She also testified the State was delayed in complying with defendant's discovery requests because of delays in obtaining defendant's prior criminal records. In addition, she testified plea negotiations were ongoing, particularly regarding whether defendant would be tried as a "habitual felon" and whether he would be tried for first- or second-degree murder. There was also evidence the motions had been calendared two to

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three weeks before the 3 November 1986 hearing but had been rescheduled because of conflicts with defendant's attorney. Defendant's attorney stated that he did not deny anything the assistant district attorney testified to, but argued the State delayed the trial in an attempt to try defendant as a habitual felon. However, defendant brought forward no evidence to support this assertion. Defendant's attorney also stated he made no request to have the motions heard at an earlier time.

Under the evidence in the record, we hold the State satisfied its burden of coming forward with evidence and that defendant failed in his ultimate burden of showing the delay between indictment and trial was unreasonable or done for the purpose of thwarting the Speedy Trial Act. Defendant did not dispute the State's evidence that the motions had been calendared on several occasions and presented no evidence showing the delay in hearing the motions was caused solely by the State. Additionally, by failing to assert his right to a speedy trial at an earlier time or bring the pending motions to the court's attention, defendant indicated he was not seeking an expeditious adjudication but was content to await trial at a later date. See *State v. Horne*, 21 N.C. App. 197, 200, 203 S.E. 2d 636, 638 (1974); see also *State v. Johnson*, 275 N.C. 264, 269, 167 S.E. 2d 274, 278 (1969) (defendant who acquiesces in delay will not be allowed to convert right to speedy trial into a vehicle to escape justice). Therefore, when the 474-day period is reduced by the delay due to the pending motions, the total time from indictment to trial is well within the 120-day limit and defendant was not denied a speedy trial as provided by N.C.G.S. Sec. 15A-701. We note defendant does not argue his constitutional right to a speedy trial was violated and therefore we do not address that issue.

II

[2] Defendant also argues the trial court erred in allowing into evidence testimony of other alleged crimes which were independent of, and distinct from, the crime for which he was being prosecuted. Specifically, defendant contends the trial court erred in admitting evidence that he trafficked in marijuana and was involved in a breaking and entering the night before the victim was shot.

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After defendant's girlfriend, Cheryl Lynn Hall, testified over objection that she saw marijuana in defendant's home and that Linton and the victim had both purchased marijuana from defendant, the following exchange took place:

Q. [The prosecutor, Mr. Jackson] Mr. Emery in the business of selling marijuana.

MR. ADAMS: Objection.

THE COURT: Overruled.

A. Yes.

Q. (Mr. Jackson) An[d] was he in the business of selling it to high school age people.

MR. ADAMS: Objection.

THE COURT: Overruled.

A. He got it for Robie and Robie sold it to the high school kids.

On direct examination, Linton testified he sold marijuana for defendant and went into detail about how the drug was packaged and where Linton ultimately sold it. Linton also testified the victim occasionally bought marijuana from defendant. He further testified over objection that defendant had traded marijuana for a car on one occasion and that the victim had once received a citation for possession of marijuana.

In addition, Linton testified about breaking and entering a Disabled American Veterans' building on Hodge Road with a Jimmy Nutter the night before the shooting:

Q. [Mr. Jackson] Did you happen to see Clifford Emery on that night?

MR. ADAMS: Objection.

THE COURT: Overruled.

A. Yes, sir. He dropped me off and picked me up.

THE COURT: He was what?

A. He dropped me off and picked me up.

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Q. (Mr. Jackson) Did you take anything from the place on Hodge Road?

A. Yes, sir.

MR. ADAMS: Objection.

THE COURT: Overruled.

A. We took—

Q. What did you take, Robie?

A. Beer.

Q. What kind of beer?

A. Schlitz and Miller. Those are the only 2 kinds I remember.

Q. How much beer in terms of cases did you take from there?

MR. ADAMS: Objection.

THE COURT: Overruled.

A. Probably about two.

Q. (Mr. Jackson) Okay.

THE COURT: About how much?

A. Two, sir.

Q. (Mr. Jackson) Speak up just a little bit, Robie. What did you do with the beer? In other words, how did you transport the beer?

MR. ADAMS: Objection.

THE COURT: Overruled.

A. We put it into the back of the car and took it to the house.

Q. What car is that?

A. The Sunbird or Cliff's car.

Q. Did Clifford Emery help you load the beer in the car?

MR. ADAMS: Objection.

THE COURT: Overruled.

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A. Yes, sir.

Q. (Mr. Jackson) Did he?

A. Yes, sir.

Q. About what time of the night was this, Robie?

MR. ADAMS: Objection.

THE COURT: Overruled.

A. From what I remember around midnight.

Q. (Mr. Jackson) Around midnight?

A. Eleven or midnight.

Q. Did you and Cliff drink any of the beer that night?

MR. ADAMS: Objection.

THE COURT: Overruled.

A. Yes, sir.

Q. (Mr. Jackson) Okay. Do you recall anything else that was taken from the American Legion Hut?

MR. ADAMS: Objection.

THE COURT: Overruled.

A. I think an American flag.

THE COURT: Well, not what you imagine, what you know?

A. I don't really remember exactly.

. . .

Q. On the night that you broke into the American Legion building on Hodge Road, did you have an occasion to see a shotgun?

MR. ADAMS: Objection.

THE COURT: Overruled.

A. Yes.

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Q. And where did you see a shotgun?

MR. ADAMS: Objection.

A. A car slowed down, we could hear it, and Cliff pulled out the gun, and broke it down and then loaded it and closed—

DEFENDANT EMERY: That's a damn lie, man.

MR. ADAMS: Motion to strike as not being responsive.

THE COURT: Well—

A. But the car kept on going.

....

Q. (Mr. Jackson) Okay. Robie, I'll ask you again, did you see—Where were you standing when you saw him put the shell in the gun?

A. He was standing on the other side of the car.

Q. Okay. And did he hold the gun up?

MR. ADAMS: Objection.

A. Yes, sir.

THE COURT: Overruled.

Defendant argues the evidence of these other alleged crimes should have been excluded since its only purpose was to demonstrate defendant's character. N.C.G.S. Sec. 8C-1, Rule 404(b) provides:

Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Rule 404(b) is consistent with North Carolina practice prior to its enactment. *State v. McKoy*, 317 N.C. 519, 525, 347 S.E. 2d 374, 378 (1986). However, evidence of other crimes, wrongs, or acts is not limited to the exceptions set out in Rule 404(b). *State v.*

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Weaver, 318 N.C. 400, 402, 348 S.E. 2d 791, 793 (1986). Rather, evidence of other offenses is admissible so long as it is relevant to any issue other than the character of the accused. *Id.* Therefore, the "acid test" for admissibility under Rule 404(b) continues to be the relevancy of the evidence. See *State v. McLain*, 240 N.C. 171, 177, 81 S.E. 2d 364, 368 (1954). However, if the court does not clearly perceive the logical relevancy between the extraneous criminal transaction and the crime charged, the accused should be given the benefit of the doubt since evidence of other crimes is likely to have a prejudicial effect on the accused's right to a fair trial. *Id.* at 176-77, 81 S.E. 2d at 368.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. Sec. 8C-1, Rule 401. We agree with the State that the evidence concerning defendant's sale of marijuana to the victim was relevant in showing the relationship between the victim and defendant. We also agree that given the evidence defendant once questioned Linton about whether the victim was a "nark," the evidence that defendant sold marijuana was admissible since it had some probative value concerning defendant's possible motive in the shooting. However, the testimony that Emery was in the business of selling marijuana to high school age persons had no tendency to make any fact of consequence more or less probable. Nor was the evidence about how defendant procured his automobile and the evidence concerning the details of how the marijuana was packaged and sold relevant to any material fact in issue. Equally irrelevant was evidence concerning the victim's citation for possession of marijuana.

Even more troubling is the State's evidence concerning the breaking and entering incident. The State contends defendant's loading the gun during the breaking and entering indicated his willingness to use the gun in a felonious manner. However, this stated purpose violates the clear intent of Rule 404(b) since prior offenses are not admissible to prove that a person acted in conformity therewith. The State in no way linked this breaking and entering to the crime with which defendant was charged. Furthermore, the extensive questioning about details of the breaking and entering were irrelevant to any material fact in issue and demonstrated instead that defendant may have committed other unre-

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lated crimes. See *State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979) (evidence that defendant committed sodomy with a dog was irrelevant to question of defendant's guilt of murder, burglary, and robbery); *State v. Platt*, 85 N.C. App. 220, 354 S.E. 2d 332 (1987) (evidence of cash containing traces of cocaine which were found in defendant's vehicle was irrelevant in defendant's trial for assault arising out of a shoot-out between a rival gang), *disc. rev. denied*, 320 N.C. 516, 358 S.E. 2d 529; *State v. Bailey*, 80 N.C. App. 705, 343 S.E. 2d 434 (1986) (cross-examination of defendant about nonconsensual sexual activity with woman other than victim irrelevant in prosecution of defendant for various sexual offenses and entitled defendant to new trial), *pet. for cert. improvidently allowed*, 318 N.C. 652, 350 S.E. 2d 94 (1986). While evidence that defendant was familiar with the gun and had used it previously might rebut defendant's claim of accident, the State greatly exceeded this purpose and questioned Linton at length about the details of the breaking and entering, details which had no connection with the crime for which defendant was being prosecuted.

Having determined some of the evidence was inadmissible, we must decide whether its admission was prejudicial such that a different result would have ensued had the evidence been excluded. See *State v. Logner*, 297 N.C. 539, 549, 256 S.E. 2d 166, 172 (1979). Resolution of this issue must be based on our reading of the record and on what seems to us to have been the probable impact of this irrelevant testimony on the minds of an average jury. *Id.* Viewing the record in its entirety, it is apparent the State spent a great deal of time focusing on the details of defendant's alleged prior offenses. We believe this evidence went beyond the scope necessary for the limited purposes for which it was offered and included details which could only relate to defendant's character and inflame the jury. See *State v. Whitney*, 26 N.C. App. 460, 463, 216 S.E. 2d 439, 441 (1975). Therefore, we hold the cumulative effect of the admission of the evidence was prejudicial error entitling defendant to a new trial.

We have carefully reviewed defendant's assignments of error concerning his motions for experts, the trial court's admission of certain other evidence, the trial court's allowing the prosecutor to refer to defendant by his nickname, and alleged errors in the jury instructions and hold the trial court's rulings did not constitute

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prejudicial error. We do not address defendant's remaining assignments of error concerning certain remarks made by the trial judge and alleged errors in his sentencing because they are unlikely to recur at retrial. For the reasons above, this action is remanded for a

New trial.

Judge BECTON concurs.

Judge PHILLIPS concurs in the result.

SHARON S. WILLIAMS v. THE HILLHAVEN CORPORATION D/B/A MEDICENTERS OF AMERICA, INC., AND RONALD RIDDLE

No. 8721SC1159

(Filed 2 August 1988)

1. Master and Servant § 10.2— wrongf^{ul} discharge in violation of public policy—statement of claim

Plaintiff's complaint stated a claim for wrongf^{ul} discharge in violation of public policy where it alleged that defendants harassed and fired her from her job as a registered nurse supervisor at a nursing home because she testified at an unemployment compensation hearing on behalf of another employee who had been fired.

2. Master and Servant § 10— employment contract—consideration in addition to services—insufficient allegations—employment at will

Plaintiff failed to allege consideration in addition to services which would take her employment contract beyond employment at will where she alleged that she continued her education while working part-time as a nurse for defendant employer and that she assumed a full-time supervisory position after completing her education, but there was no allegation that plaintiff's continuation of her education was a condition of obtaining or maintaining full-time employment with defendant.

3. Master and Servant § 13— tortious interference with employment contract—insufficient allegations against non-outsider

Plaintiff's allegation that she was the only nurse defendant nursing home administrator had ever terminated because it was "not really his position to fire nurses" was insufficient to show that defendant's motives for procuring the termination of plaintiff's employment contract were not related to his business interest in the contract so as to render defendant, a non-outsider,

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amenable to a claim for tortious interference with plaintiff's contract of employment.

4. Appeal and Error §§ 39.1, 40— absence of summons from record—timeliness of filing record on appeal—motion to dismiss appeal

Defendants' argument that the appeal should be dismissed for failure to include the summons in the record on appeal should have been addressed pursuant to a motion to dismiss under App. Rule 25, and defendants' argument that the appeal should be dismissed for failure to file a timely record on appeal should have been made under App. Rule 10(d).

APPEAL by plaintiff from *Freeman, Judge*. Order entered 6 July 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 April 1988.

This is an action for compensatory and punitive damages arising from plaintiff's discharge from employment as a registered nurse supervisor at Silas Creek Manor Nursing Home. Prior to her employment at Silas Creek Manor, plaintiff had been employed as a registered nurse for seven years.

Plaintiff was hired by Silas Creek Manor on or about 28 March 1979 in a part-time position. She attended school and worked part-time until December 1983. At that time she completed her education and was hired as a full-time registered nurse. In January 1984, she was promoted to supervisor, a position she held until 21 February 1986.

When she was hired by Silas Creek Manor, she was given an employee handbook which indicated that permanent employment was based upon work performance and substantial compliance with the handbook rules and guidelines. Plaintiff alleges that other employees confirmed that she could be discharged only for incompetence or serious infractions of the handbook rules. She further alleges that prior to 1986 she had never been advised by any of her superiors that her performance was inadequate or that she had violated any rules.

On or about 7 January 1986, plaintiff testified under subpoena at an unemployment compensation hearing on behalf of a nurse assistant who had been fired by Silas Creek Manor. The nurse assistant was awarded unemployment benefits. After the hearing, defendant Ronald Riddle, Administrator of Silas Creek Manor, became very hostile to plaintiff. He refused to allow her

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to work overtime without prior approval (which he had permitted for six years), wrote her up for leaving blank spaces on her admission charts, and accused plaintiff of doing an improper admission (when she did not do the admission in question).

On 21 February 1986, plaintiff was fired for leaving medication at a patient's bedside. Prior to testifying at the unemployment compensation hearing, plaintiff had received only two written warnings for infractions. From 7 January 1986 until she was fired in February, she allegedly received at least three written warnings, harassment and close scrutiny by her supervisors, and was singled out for infractions that other personnel were allowed to commit.

Plaintiff instituted this action on 12 March 1987, for abusive discharge in violation of public policy, breach of employment contract, and malicious interference with the employment contract.

On 20 May 1987, defendants moved to dismiss the case under N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. It was granted on 6 July 1987, and the case was dismissed with prejudice. From this judgment, plaintiff appeals.

Kelly V. Hazlett, attorney for plaintiff-appellant.

Hutchins, Tyndall, Doughton & Moore, by H. Lee Davis, Jr., and Jackson, Lewis, Schnitzler & Krupman, by Gary R. Kessler and David L. Gordon, attorneys for defendant-appellees.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in dismissing plaintiff's claims for abusive discharge, breach of employment contract and tortious interference with a contract under N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Under N.C.G.S. § 1A-1, Rule 12(b)(6), a complaint is deemed sufficient:

where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim. Detailed fact pleading is not required. . . . A complaint should not be

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dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. . . . In analyzing the sufficiency of the complaint, the complaint must be liberally construed.

Dixon v. Stuart, 85 N.C. App. 338, 340, 354 S.E. 2d 757, 758 (1987) (citation omitted). The trial court must treat the allegations of the complaint as true. *Harris v. Duke Power Co.*, 83 N.C. App. 195, 196, 349 S.E. 2d 394, 395 (1986), *aff'd*, 319 N.C. 627, 356 S.E. 2d 357 (1987), *citing Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976).

Plaintiff appeals the dismissal of three separate claims. Since she does not appeal dismissal of her claims for punitive damages against defendants Hillhaven and Riddle, we deem those claims abandoned.

I.

Wrongful Discharge in Violation of Public Policy.

[1] This tort was first recognized in this state in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E. 2d 818, *disc. rev. denied*, 314 N.C. 331, 335 S.E. 2d 13 (1985), where a nurse was fired after refusing to commit perjury in her testimony in a medical malpractice lawsuit. This Court held that although the employment contract between the nurse and Duke was terminable at will, no employer:

has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case, as plaintiff alleges happened here. One of the merited glories of this country is the multitude of rights that its people have, rights that are enforced as a matter of course by our courts, and nothing could be more inimical to their enjoyment than the unbridled law defying actions of some and the false or incomplete testimony of others. If we are to have law, those who so act against the public interest must be held accountable for the harm inflicted thereby; to accord them civil immunity would incongruously reward their lawlessness at the unjust expense of their innocent victims.

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Id. at 342-43, 328 S.E. 2d at 826. The Court thus created an exception to the general rule that an employee at will has no tort claim for retaliatory discharge, *Dockery v. Table Co.*, 36 N.C. App. 293, 244 S.E. 2d 272, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978).

This Court has refused to extend the *Sides* exception in at least three cases. *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986) (in an action for intentional infliction of emotional distress plaintiffs were discharged because they allegedly were verbally abused and sexually harassed by their employer); *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E. 2d 617, *disc. rev. denied*, 316 N.C. 557, 344 S.E. 2d 18 (1986) (plaintiff's wrongful discharge was allegedly for transferring two licensed practical nurses from the emergency room to comply with the State Nursing Practice Act); and *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E. 2d 39 (1986) (plaintiff was allegedly fired for raising safety concerns).

Defendants are correct that plaintiff's claim is distinguishable from the facts in *Sides*. Plaintiff was not threatened in any way prior to her testimony at the unemployment compensation hearing. Neither was plaintiff encouraged to commit perjury on behalf of defendants, nor was she ever told not to testify.

However, taking the allegations in the complaint to be true as required by Rule 12(b)(6), the defendants in our opinion have violated the rationale of *Sides*. Although defendants did nothing to plaintiff before her testimony, they allegedly harassed and fired her after the fact because of her testimony. In effect, according to the complaint, they fired her for not committing perjury (as the plaintiff in *Sides* was told to do), even though they did not encourage her to do so. In *Sides* and the case *sub judice* the plaintiff, according to the complaint, was discharged from her employment for telling the truth. Thus, the plaintiff falls into the same narrow exception to the general rule (that an employee at will has no tort claim to retaliatory discharge) that *Sides* created.

The *Sides* court quoted at length from *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 188-89, 344 P. 2d 25, 27 (1959).

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The presence of false testimony in any proceeding tends to interfere with the proper administration of public affairs and the administration of justice. *It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.* The threat of criminal prosecution would, in many cases, be a sufficient deterrent upon both the employer and employee, the former from soliciting and the latter from committing perjury. However, in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. *To hold otherwise would be without reason and contrary to the spirit of the law. The public policy of this state as reflected in the penal code sections referred to above would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury. To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs.* This is patently contrary to the public welfare. The law must encourage and not discourage truthful testimony. The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered. (Emphasis added.)

Sides, 74 N.C. App. at 340, 328 S.E. 2d at 825.

Contrary to defendant's argument, *Petermann* is not an isolated case. The *Sides* Court cited eight cases from other states that recognize "a common law cause of action in tort for employees at will who are discharged for reasons that are in some way wrongful or socially undesirable." *Id.* at 340-41, 328 S.E. 2d at 825-26.

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The North Carolina Legislature has recently enacted a cause of action for an identical claim to the case before us. Under N.C.G.S. § 96-15.1:

(a) No person may discharge, demote, or threaten any person because that person has testified or has been summoned to testify in any proceeding under the Employment Security Act.

(b) Any person who violates the provisions of this section shall be liable in a civil action for reasonable damages suffered by any person as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the party claiming a violation to prove a claim under this section.

(c) The General Court of Justice shall have jurisdiction over actions under this section.

(d) The statute of limitations for actions under this section shall be one year pursuant to G.S. 1-54. (1987, c. 532, s. 1.)

Although this statute was not effective until 1 July 1987 (and therefore does not apply to the plaintiff), the public policy of the State is clear: a person who is discharged because of testifying at an Employment Security Act proceeding has a cause of action.

Plaintiff alleged sufficient facts in her complaint to avoid a dismissal under Rule 12(b)(6). She alleged that she was employed by defendant until 21 February 1986; that she was fired by defendants because she testified under subpoena on behalf of another employee at an unemployment compensation hearing on 7 January 1986; that the other employee did in fact receive unemployment compensation; that defendant Riddle became visibly upset, agitated and disturbed during plaintiff's testimony at the hearing; that defendant Riddle became even more hostile and harassed plaintiff after the hearing, citing several such incidents of alleged harassment; that prior to January 1986 plaintiff received only two written warnings for rule violations in almost six years of employment; and that defendant Riddle fired her only six weeks after her testimony at the unemployment compensation hearing.

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Because these facts state a claim of wrongful discharge in violation of public policy as set forth in *Sides* we reverse the trial court in dismissing this cause of action and remand for a trial on the merits.

II.

Breach of Employment Contract.

[2] Plaintiff next argues that she had an enforceable employment contract because she gave additional consideration over and above her general services and duties. The additional consideration was completing her education before assuming a full-time supervisory position.

In *Tuttle v. Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964), the Court stated the general rule that "[w]here, however, the employee gives consideration in addition to his services, as where he relinquishes a claim for personal injuries or gives some other thing of value, a contract for permanent employment, or as long as the services are satisfactory, is not such an indefinite contract as to come within the rule." 263 N.C. at 219, 139 S.E. 2d at 251.

The Courts have found additional consideration sufficient to establish an employment contract in several cases. *Dotson v. Guano Co.*, 207 N.C. 635, 178 S.E. 100 (1935) (employee's relinquishment of personal injury claim was additional consideration); *Jones v. Light Co.*, 206 N.C. 862, 175 S.E. 167 (1934) (additional consideration where plaintiff agreed to "break a strike" for defendant in return for employment for at least ten years); and *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E. 2d 818 (plaintiff's relocation from Michigan to Durham was additional consideration for assurances that she could be discharged only for incompetence).

As the Courts stated in *Tuttle* and in *Burkhimer v. Gealy*, 39 N.C. App. 450, 250 S.E. 2d 678, *disc. rev. denied*, 297 N.C. 298, 254 S.E. 2d 918 (1979), "employment contracts that attempt to provide for permanent employment, or 'employment for life,' are terminable at will by either party [unless there is special consideration in addition to services]." 39 N.C. App. at 454, 250 S.E. 2d at 682.

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In the case *sub judice*, plaintiff alleges that she continued her education. "Plaintiff attended school for the next four years, and worked part-time. Upon completion of her schooling in December 1983, Plaintiff went to a full-time position."

Taking this allegation as true as required by Rule 12(b)(6), there is still no nexus on the face of the complaint to link that education as a condition of obtaining or maintaining full-time employment with defendant. In fact, in paragraphs 9 and 10 of her complaint, plaintiff alleges nothing more than employment at will contract.

We hold that this claim fails under Rule 12(b)(6) because of the "absence of fact sufficient to make a good claim." *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E. 2d 222, 224 (1985). The trial court committed no error.

III.

Tortious Interference with an Employment Contract.

[3] Tortious interference with an employment contract has five elements:

- 1) a valid contract between the plaintiff and a third person which confers upon the plaintiff some contractual right against the third person, 2) the defendant knows of the contract, 3) intentionally induces the third person not to perform the contract, 4) and in so doing acts without justification, 5) resulting in actual damages to plaintiff.

United Laboratories v. Kuykendall, 87 N.C. App. 296, 308, 361 S.E. 2d 292, 299 (1987), citing *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E. 2d 176, 181-82 (1954), *reh'g denied*, 242 N.C. 123, 86 S.E. 2d 916 (1955).

In *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976), the Court stated that a person accused of tortious interference with a contract in this action must be an outsider, which "appears to connote one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof." 289 N.C. at 87, 221 S.E. 2d at 292.

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Plaintiff's complaint alleges that defendant Riddle acted as an agent of Hillhaven Corporation, but acted outside the scope of his employment. It appears that plaintiff is alleging that defendant Riddle is both a non-outsider and an outsider.

Although *Smith* also held that the "non-outsider status of a defendant was immaterial where the allegations in the complaint showed that defendants' motives for procuring the termination of the employment contract were not related to his business interest in the contract," *Sides v. Duke University*, 74 N.C. App. at 347, 328 S.E. 2d at 829, plaintiff's complaint still does not allege that Riddle's motives were not related to his own business interest in the contract. The fact alleging that plaintiff was the only nurse Riddle had ever terminated because it was "not really his position to fire nurses" is insufficient to meet the conditions of the rule set forth in *Smith*.

We hold that under Rule 12(b)(6), this claim fails because of the absence of sufficient facts and find no error by the trial court on this claim.

IV.

[4] Defendants' argument that the appeal should be dismissed for failure to include the summons in the record on appeal should have been addressed pursuant to a motion to dismiss under Rule 25 of the North Carolina Rules of Appellate Procedure. Further, defendants' argument that the appeal should be dismissed for failure to file a timely record on appeal should have been made under Rule 10(d) of the North Carolina Rules of Appellate Procedure. We have considered defendants' arguments, however, and find them to be without merit.

In conclusion, we find no error with the trial court's dismissal of plaintiff's claims for breach of contract and tortious interference with an employment contract.

We reverse and remand for a trial on the merits of plaintiff's claim for wrongful discharge in violation of public policy.

Affirmed in part, reversed and remanded in part.

Judges WELLS and PARKER concur.

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ANDREA D. THOMAS, EMPLOYEE, PLAINTIFF v. HANES PRINTABLES, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER, DEFENDANTS

No. 8710IC1167

(Filed 2 August 1988)

Master and Servant §§ 68, 94.1—occupational disease—tendonitis—inability to earn same wages after injury—findings not supported by evidence

Where plaintiff contracted the occupational disease tendonitis while performing her duties as an inspect-fold operator and was given an intracompany transfer to a position where she made over \$100 less per week, she met the *Hilliard* test of disability, and the Industrial Commission erred in concluding that her inability to earn the same wages in other jobs was due merely to her lack of skill in the new job rather than to her occupational disease.

APPEAL by plaintiff from an Opinion and Award of the Full Commission entered by Commissioner William H. Stephenson and filed on 4 August 1987. Heard in the Court of Appeals 7 April 1988.

Morgan & Morton, by J. Griffin Morgan, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr., for defendant-appellees.

JOHNSON, Judge.

Plaintiff filed this claim with the Industrial Commission to recover workers' compensation benefits for a loss of income sustained due to an intracompany transfer necessitated by a compensable injury. Ms. Thomas transferred because her former duties in her inspect-fold job caused her to contract the occupational disease, tendonitis.

Andrea Thomas began her employment with Hanes Printables in October 1980, and has been continuously employed there, with the exception of a brief layoff, since February 1981. In late 1984 or early 1985, plaintiff contracted tendonitis of the right shoulder, and was diagnosed as having the disease on 19 March 1985. Plaintiff was totally disabled for two and 6/7 weeks and was granted workers' compensation benefits pursuant to G.S. 97-29 for that period, which included twenty days occurring between 20

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March 1985 and 7 December 1985. She was partially disabled from 29 August 1985 through 1 July 1986 and was compensated for that period of disability as well.

Plaintiff and defendant-employer were unable to agree upon whether she was entitled to benefits after 1 July 1986 pursuant to G.S. 97-30. She then requested a hearing to have that issue decided, and on 29 July 1986 the matter was heard before Deputy Commissioner Morgan S. Chapman. On 21 November 1986, the Commission's decision was filed, which concluded that plaintiff was not partially disabled after 1 July 1986 and was not therefore entitled to benefits pursuant to G.S. 97-30.

On appeal to the Full Commission, the Opinion of the Deputy Commissioner, in which benefits were denied, was affirmed. From this Opinion and Award plaintiff appeals.

Plaintiff presents four questions for review by this Court, but concedes that the ultimate issue to be decided on appeal is whether she continued to be partially disabled as defined by G.S. 97-2(9) after 1 July 1986. We think that the present case law and statutes support a conclusion that plaintiff continued to be partially disabled after 1 July 1986, and therefore reverse the Opinion and Award of the Industrial Commission.

The standard of review we must employ when considering an appeal taken from an Opinion and Award of the Industrial Commission is to affirm its findings when there is competent evidence to support them, although evidence supportive of a contrary result may exist. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982). The Commission's legal conclusions, however, are reviewable by the appellate courts. *Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968).

THE HILLIARD TEST

G.S. 97-2(9) defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The three-prong test employed in order to determine whether plaintiff is disabled due to a reduction in earning capacity has become known as the *Hilliard Test*. According to *Hilliard v. Apex Cabinet Co.*, 305 N.C.

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593, 595, 290 S.E. 2d 682, 683 (1982), the Commission must find, in order to support a conclusion of disability:

- (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
- (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
- (3) that this individual's incapacity to earn was caused by plaintiff's injury.

I

The parties have stipulated that plaintiff has satisfied the first requirement of the test. Stipulation number thirteen states that: "[a]s a result of plaintiff's occupational disease, tendonitis, she is incapable of returning to work as an Inspect-Fold Operator and earning the same wages she previously earned in that occupation."

II

Plaintiff's post-injury employment in fact, as well as her employment potential, shall become our focus as our attention shifts to the second requirement. The evidence discloses that plaintiff is a thirty-one year old female with an eighth grade education and limited reading ability. She has no work experience, training, or skill which qualify her for any employment other than the textile industry or other low-skilled manual labor oriented occupations.

Before plaintiff's transfer, she earned an average weekly wage of \$381.27, and after the job transfer, she was only able to earn an average weekly wage of \$229.14; a difference of over \$100.00 per week. Her wages did not improve as a result of reaching maximum medical improvement, and despite her best efforts, she has not been able to earn the wage in her new position that she was earning before she contracted the occupational disease.

Plaintiff also attempted to supplement her income by looking outside her permanent employment for work. She found a part-time job as a dishwasher on weekends earning \$3.85 per hour, but

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was unable to sustain that employment because of the strain it created. Although the practice of comparing earnings before and after an injury is not the proper method to exhibit diminished earning capacity, *Hill v. Dubose*, 234 N.C. 446, 67 S.E. 2d 371, this Court has indicated that this is a valid factor which deserves consideration. *Donnell v. Cone Mills Corp.*, 60 N.C. App. 338, 299 S.E. 2d 436, *disc. rev. denied*, 308 N.C. 190, 302 S.E. 2d 243 (1983).

In determining the extent to which an occupational disease affects an employee's wage-earning ability in another position, the line of inquiry must center on that particular individual's earning capacity and not that of a different individual. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 345 S.E. 2d 374 (1986). The Court also states that:

If preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone younger or who possesses superior education or work experience.

Hendrix at 188, 345 S.E. 2d at 380, quoting, *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 441, 342 S.E. 2d 798, 808 (1986).

In denying benefits to plaintiff, the Commission placed special emphasis upon their prediction that plaintiff may have the future capability of earning the same wage that she was earning prior to her injury. This prediction was based at least in part upon evidence to which the parties stipulated that "[o]n July 29, 1985 at least one Hanes employee working as a Stitch-Display Sewing Machine Operator [the position to which plaintiff was transferred] had an average weekly wage greater than the plaintiff's average weekly wage as an Inspect-Fold operator [plaintiff's former position]."

By reviewing the evidence in this manner, the Commission (1) acknowledges the undisputed fact that plaintiff is paid according to her rate of production, (2) acknowledges as well, the fact that her rate of production has substantially diminished because of the transfer, which was necessitated by the compensable injury she

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sustained in the former position, and (3) indirectly concedes that plaintiff is incapable of earning the same wages after her injury in any other employment due to the fact that her present earning capacity has been substantially diminished.

In finding of fact number five, the Commission states:

If she were to work at a faster rate, she could earn the same or greater wages as she was earning at the time she contracted this occupational disease. *However, she does not yet have the skill to accomplish that goal.* Her inability to earn the same wages in this other job is not due to her occupational disease but rather to her lack of skill in the job.

(Emphasis added.)

We hold that this finding of fact is not supported by the evidence, as the analysis contained therein was prematurely concluded. While it is correct that plaintiff's inability to earn the same wages as in her former employment is not due to a physical incapacity per se, the transfer of positions which resulted in a diminished earning capacity was necessitated by a compensable injury. Therefore, plaintiff's inability to earn the same wages in other jobs is due to her occupational disease and not merely to her "lack of skill in the job" as the Commission found. Additionally, the Commission's conclusion of law that plaintiff is not entitled to benefits for partial disability after 1 July 1986, because she is capable of earning the same wages she earned before contracting the occupational disease, is not supported by the findings of fact.

III

The third requirement of the *Hilliard Test*, that this individual's incapacity to earn was caused by her injury, has been considered and answered in subsection II. As previously stated, plaintiff sustained a transfer because she contracted an occupational disease while performing her duties as an inspect-fold operator. After the transfer, which was necessitated by a compensable injury, she suffered a diminished earning capacity. It logically follows, therefore, that her incapacity to earn was *caused by her injury*.

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SEBASTIAN V. WATKINS

In reversing this Award, we are mindful of the Commission's reliance upon *Sebastian v. Watkins Hair Styling*, 40 N.C. App. 30, 251 S.E. 2d 872 (1979). We find the facts of the case *sub judice* and those in *Sebastian* distinguishable. The plaintiff in *Sebastian* was unable to continue her employment as a hairdresser because of a personal sensitivity to chemicals used in her work. This Court held that there was no evidence that subsequent to 31 January 1977, when her skin condition completely cleared up, plaintiff's inability to earn wages was the result of an occupational disease. The Court was unconvinced that plaintiff's "personal sensitivity" met the definition of an occupational disease pursuant to G.S. 97-53(13) either before or after 31 January 1977, when the effects of the exposure to the chemicals had dissipated.

The case *sub judice*, however, involves an undisputed occupational disease by definition; "[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment . . ." rather than a personal sensitivity which is peculiar to a particular individual. *Id.* The plaintiff suffered disablement, which is equivalent to disability as defined in G.S. 97-2(9); i.e., incapacity because of injury to earn the wages she was earning prior to the injury in the same or any other employment, because of a job transfer compelled by a compensable injury.

We find the circumstances in the present case more similar to those in *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 349 S.E. 2d 70 (1986) than to those in *Sebastian*. In *Heffner*, the plaintiff retired after having learned that the plant where he was employed would soon close, filed a claim a few months later seeking benefits for an occupational lung disease, and was denied benefits because he suffered no incapacity for work resulting from his occupational disease, but rather because of his desire to retire which was motivated by the plant closing. The Court stated that:

Because disability measures an employee's present ability to earn wages, *Webb v. Pauline Knitting Industries*, 78 N.C. App. 184, 336 S.E. 2d 645 (1985), and is unrelated to a decision to withdraw from the labor force by retirement, the Commission may not deny disability benefits because the

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claimant retired where there is evidence of a diminished earning capacity caused by an occupational disease. *So long as the disease has, in some way, diminished the employee's ability to earn wages, he may recover disability compensation.* See *Preslar v. Cannon Mills Co.*, 80 N.C. App. 610, 343 S.E. 2d 209 (1986) and *Donnell v. Cone Mills Corp.*, 60 N.C. App. 338, 299 S.E. 2d 436 (1983).

Id. at 88, 349 S.E. 2d at 74 (emphasis added).

The Commission is met with the task of considering and resolving the disability question based upon an individual's particular circumstances and characteristics. Just as the plaintiff's disability was required to be considered in light of the plant's closing in *Heffner*, our plaintiff's disability must be considered in light of her particular characteristics in addition to the fact that her transfer adversely affected her ability to earn wages.

Therefore, we remand this case for a determination of compensation for disability not inconsistent with this opinion.

Reversed and remanded.

Judges BECTON and GREENE concur.

TAR HEEL INDUSTRIES, INC. v. E. I. duPONT DE NEMOURS & COMPANY,
INC. AND GUIGNARD FREIGHT LINES, INC.

No. 885SC82

(Filed 2 August 1988)

Unfair Competition § 1— intrastate transportation contract— seeking alternatives to contract without giving notice— exercise of termination provision— no unfair and deceptive trade practice

Plaintiff was not entitled to relief on its claim for unfair and deceptive trade practices where plaintiff provided shuttle service between defendant's plant and a warehouse pursuant to a contract which provided for termination upon 60 days' notice; defendant did not engage in an unfair and deceptive trade practice by failing to notify plaintiff that it was seeking alternatives to plaintiff's contract; and it was not unfair or deceptive for defendant to exercise the contract's termination clause. N.C.G.S. § 75-1.1.

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APPEAL by plaintiff from *Tillery (Bradford), Judge*. Order entered 8 May 1987 and judgment entered 24 July 1987 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 7 June 1988.

In April 1985, plaintiff Tar Heel Industries, Inc. filed a complaint against E. I. duPont de Nemours & Company, Inc. (DuPont) and Guignard Freight Lines, Inc. (Guignard) alleging three claims for relief: (1) breach of contract; (2) civil conspiracy; and (3) violation of G.S. 75-1.1 *et seq.* On 11 February 1986, plaintiff voluntarily dismissed without prejudice all claims against Guignard, and Guignard is not a party to this appeal. DuPont's motion to dismiss the breach of contract claim was allowed by Judge Henry L. Stevens on 6 March 1986. On 8 May 1987, Judge Tillery allowed plaintiff's motion to compel discovery of certain documents and entered a protective order as to other documents. Plaintiff's motion to amend its complaint to allege the Chapter 75 claim in more detail was allowed on 2 July 1987. On that same date, Judge Tillery granted DuPont's motion for summary judgment on the civil conspiracy claim after plaintiff conceded that there were no genuine issues of material fact and DuPont was entitled to judgment as a matter of law. On 24 July 1987, Judge Tillery granted DuPont's motion for summary judgment on the Chapter 75 claim. Plaintiff appeals.

Plaintiff brings forward two assignments of error. First, it contends the trial court erred by refusing to compel DuPont to produce certain documents during discovery. Second, plaintiff assigns error to the granting of summary judgment on the Chapter 75 claim. We hold that plaintiff is not entitled to relief under Chapter 75 and affirm the trial court's granting of summary judgment. In light of our holding on this claim, we find it unnecessary to address plaintiff's assignment of error relating to discovery.

William R. Shell and Carr, Swails, Huffine & Crouch, by Auley M. Crouch, III, for plaintiff-appellant.

Moore & Van Allen, by Joseph W. Eason and Denise Smith Cline, for defendant-appellee E. I. duPont de Nemours & Company, Inc.

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SMITH, Judge.

I. Facts

The affidavits and exhibits before the trial court on DuPont's motion for summary judgment on the Chapter 75 claim showed that in 1974 plaintiff and DuPont entered into a contract for intrastate carriage of yarn and staple fiber from DuPont's Cape Fear plant in Leland, North Carolina to warehouses in Brunswick County including a warehouse known as the Maco warehouse. The service plaintiff provided was known as a "shuttle service" and was required on a twenty-four hour basis since DuPont's Cape Fear plant had no on-site warehouse. On 15 December 1980, the parties entered into a new contract. The 1980 contract provided in part:

1. PERIOD OF AGREEMENT

This Agreement shall commence on January 1, 1981 and remain in effect until December 31, 1981, and shall continue in full force and effect thereafter, subject to the right of either party to terminate this Agreement at any time upon giving the other party at least sixty (60) days' prior written notice.

DuPont's employee John A. Rigsbee was responsible for monitoring the shuttle operation. His office was located in the Maco warehouse which was owned by DuPont and operated under a distribution contract by Gulf Atlantic Corporation (Gulf Atlantic). Rigsbee's duties included reducing the overall costs of the shuttle operation. During 1981, DuPont attempted to lower costs on the shuttle service by reducing the number of plaintiff's employees per shift and by reducing the number of trailers. On 15 December 1981, the parties executed an amendment to the 1980 contract reflecting the reduced number of trailers effective 1 January 1982.

Throughout 1981 and 1982, Rigsbee investigated other ways to obtain the shuttle service. He looked at a "management fee" system and a DuPont-operated system using leased trailers. Rigsbee also received proposals from Lebarnold, Inc. (affiliated with ADW, Inc.). In November 1981, Rigsbee sent a memo to a DuPont employee indicating that the management fee system would be more expensive than plaintiff's contract and that "[t]he only other

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way we can sell this is through better control considering [plaintiff's president] is ready to retire and his manager of the shuttle is 71 years old." In May 1982, DuPont requested Lebarnold, Inc. and plaintiff to submit bids for the shuttle service. Plaintiff's bid was not the lowest bid, and plaintiff was allowed to submit a second bid in June 1982. Plaintiff's second bid was still not the lowest, but DuPont decided to continue using plaintiff's services because Lebarnold did not have the necessary intrastate operating authority from the Utilities Commission.

On 23 August 1982, plaintiff and DuPont executed a second amendment to the 1980 contract which changed the pricing system used to compensate plaintiff. This amendment followed DuPont's insistence that plaintiff reduce costs under the contract. On 28 February 1983, the parties executed a third amendment to the 1980 contract to account for charges for transportation to a warehouse not named in the original contract.

On 29 November 1983, DuPont again sought bids for the shuttle service and invited Williams Trucking Co., Guignard and plaintiff to submit bids. In its complaint, plaintiff alleges that Rigsbee demanded a copy of plaintiff's bid before the bidding period was closed and that Rigsbee shared plaintiff's bid with Guignard before Guignard's bid was submitted. However, plaintiff presented no evidence of these alleged facts at the hearing on summary judgment. DuPont presented evidence that its employees did not see plaintiff's bid before receiving Guignard's bid and that Guignard's employees did not see plaintiff's bid before Guignard's bid was submitted to DuPont.

Plaintiff's bid was not the lowest. Plaintiff's president, E. G. Lackey, wrote a letter to DuPont questioning whether DuPont had fully explained the contract requirements to Guignard. DuPont met with Guignard representatives and presented a draft of the contract reflecting Guignard's bid which bore the notation: "DRAFT ONLY. IN NO WAY SHOULD RECEIPT OF A COPY OF THIS AGREEMENT BE INTERPRETED AS A COMMITMENT ON THE PART OF E. I. DUPONT DE NEMOURS." DuPont again allowed plaintiff to submit another bid. Plaintiff did not rebid on DuPont's specifications but instead rebid on an alternative proposal.

On 26 January 1984, DuPont gave plaintiff 60 days' notice of DuPont's intent to terminate the 1980 contract. Plaintiff respond-

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ed by demanding that DuPont repurchase five trailers and the licenses used in the shuttle operation. DuPont proposed to purchase four of the trailers but did not acknowledge legal responsibility for the trailers and licenses.

Guignard was awarded the shuttle service contract and published a tariff for the shuttle services. Plaintiff filed a complaint before the North Carolina Utilities Commission (NCUC) on 24 February 1984 challenging the Guignard tariff as an illegal rebating scheme and seeking to prevent actual operation under the tariff. On 26 March 1984, plaintiff offered to continue providing service under the terms of the terminated contract. DuPont agreed to extend the contract on a temporary basis but reserved the right to cancel immediately upon written notice. Plaintiff's president signed and returned DuPont's letter extending the contract on 2 April 1984.

In a recommended order, the NCUC rejected plaintiff's charge of illegal rebating and proposed to allow Guignard's tariff to become effective. Plaintiff appealed to the full Commission which on 18 September 1984 adopted the proposed order to be effective on 7 December 1984.

On 26 November 1984, DuPont advised plaintiff of its intent to terminate the contract extension effective 10 December 1984. Plaintiff appealed the NCUC order to this Court and obtained a stay of the order allowing Guignard's tariff to become effective. DuPont then extended plaintiff's contract "on a day-to-day basis" after 10 December 1984. Subsequently, this Court reversed the NCUC order. *State ex rel. Utilities Comm. v. Tar Heel Industries, Inc.*, 77 N.C. App. 75, 334 S.E. 2d 396 (1985).

In early April 1985, DuPont entered into a labor service agreement for drivers with Gulf Atlantic and an equipment lease agreement with L. B. Guignard, Inc. On 11 April 1985, DuPont informed plaintiff of its intent to terminate the contract extension on 20 April 1985. Plaintiff filed the complaint in this case and obtained a temporary restraining order and a preliminary injunction extending the effective date of the termination until 60 days after the 11 April 1985 notice. DuPont subsequently cancelled the labor contract with Gulf Atlantic and the equipment lease with L. B. Guignard, Inc. On 12 June 1985, Conoco, Inc., a subsidiary of DuPont, began providing shuttle service for DuPont.

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When plaintiff first began providing shuttle services to DuPont in 1974, it had other customers besides DuPont. Over the years, plaintiff decided to devote all its business resources to the DuPont shuttle contract and stopped serving all its other customers. When Conoco took over the shuttle service, plaintiff ceased all operations.

II. Chapter 75 Claim

DuPont is entitled to summary judgment on the Chapter 75 claim "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and [DuPont] is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are . . . unlawful." G.S. 75-1.1. "The determination of whether an act is unfair or deceptive is a question of law for the court." *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 230, 314 S.E. 2d 582, 584, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984).

Our Supreme Court has explained that a practice will be considered unfair 'when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' 'A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.' A practice will be considered deceptive 'if it has the capacity or tendency to deceive.'

Dull v. Mut. of Omaha Ins. Co., 85 N.C. App. 310, 315-16, 354 S.E. 2d 752, 755, *disc. rev. denied*, 320 N.C. 512, 358 S.E. 2d 518 (1987) (citations omitted). We hold that there are no material issues of fact and that DuPont did not violate G.S. 75-1.1. The trial court's ruling is affirmed.

In essence, plaintiff asserts that DuPont engaged in unfair and deceptive trade practices by not notifying plaintiff that it was looking for alternatives to plaintiff's contract. Plaintiff reasons that since DuPont was seeking alternatives, it acted unfairly by not informing plaintiff of its efforts to find another carrier or an

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alternative management system and thus denied plaintiff the opportunity to seek other contracts to stay in business. We disagree. Under the facts of this case, we find that it was not unfair or deceptive for DuPont to study and seek alternative methods of transportation; nor was it unfair or deceptive to exercise the contract's termination clause.

In *Dull, supra*, this Court addressed whether it was unfair or deceptive for the defendants to terminate the plaintiffs' contracts to sell defendants' insurance policies. One of the factors the Court considered in determining that the defendants did not engage in unfair or deceptive trade practices was that the contracts were terminable at will. In this case, the contract only required 60 days' notice for either party to terminate the contract. DuPont's exercise of the termination clause does not constitute an unfair or deceptive trade practice. Furthermore, plaintiff cannot complain that it should have been informed that DuPont was looking for alternatives to plaintiff's contract. The parties' relationship was a business relationship premised on a contract which only required 60 days' notice of termination. Plaintiff was not entitled to notice of DuPont's efforts to reduce costs associated with the shuttle service. We note however that plaintiff was aware at least by May 1982, when DuPont first solicited bids for the shuttle service, that DuPont was considering alternatives to plaintiff's contract even though actual notice of termination was not given until January 1984. The fact that plaintiff continued to devote all its resources to performing the DuPont contract was a decision plaintiff made knowing that the contract could be terminated on 60 days' notice. Plaintiff is not entitled to recovery simply because its decisions to continue serving only DuPont had unfavorable results. No Chapter 75 claim exists against DuPont for exercising its right to terminate the contract.

III. Other Assignments of Error

Plaintiff also assigns error to the trial court's entry of a protective order and failure to order discovery of certain documents. In light of our holding that DuPont was entitled to terminate the contract according to the contract terms, we find it unnecessary to discuss this assignment of error.

The judgment of the trial court is affirmed.

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Affirmed.

Judges EAGLES and ORR concur.

PAUL L. VON HAGEL, ADMINISTRATOR OF THE ESTATE OF THE LATE HEDY MARY VON HAGEL, DECEASED, AND PAUL L. VON HAGEL, INDIVIDUALLY v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA

No. 8810SC64

(Filed 2 August 1988)

1. Unfair Competition § 1— unfair and deceptive trade practices— failure to allege frequent acts indicating general practice

The trial court properly dismissed plaintiff's claim for unfair and deceptive trade practices in violation of N.C.G.S. § 58-54.4(11) and N.C.G.S. § 75-1.1, since plaintiff failed to allege that defendant insurer engaged in prohibited acts "with such frequency as to indicate a general practice."

2. Insurance § 44— private duty nursing care— insurer's bad faith refusal to pay claim— sufficiency of complaint

Allegations in plaintiff's complaint were sufficient to support a claim for bad faith refusal to pay a justifiable insurance claim for private duty nursing care where plaintiff alleged that, despite the opinions of two of decedent's treating physicians regarding the necessity of nursing care, defendant refused to investigate the claim or consult a qualified physician for evaluation before denying the claim; such refusal was in bad faith; and defendant refused to pay for private duty nursing care after it had previously approved that expense and communicated that approval to plaintiff.

3. Fraud § 9— plaintiff's reliance on defendant's allegedly false statements— insufficiency of complaint

The trial court properly dismissed plaintiff's claim for fraud in defendant's refusal to pay an insurance claim, since plaintiff failed to allege that he did rely on defendant's alleged false statements to his detriment.

4. Torts § 1— refusal to pay under insurance policy— infliction of emotional distress— insufficiency of complaint

Plaintiff's allegation that defendant willfully and intentionally inflicted emotional distress in refusing to pay under an insurance policy when defendant knew of plaintiff's vulnerable physical and mental condition was insufficient to state a claim, since plaintiff was required to allege that defendant demonstrated calculated intentional conduct causing emotional distress directed toward plaintiff.

5. Torts § 1— no tort of outrage

The tort of outrage is not recognized in this state.

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APPEAL by plaintiff from *Bailey (James H. Pow, Judge)*. Order entered 24 August 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 11 May 1988.

On 26 March 1987, plaintiff filed a complaint arising out of defendant's denial of an insurance claim for private duty nursing provided to plaintiff's now-deceased wife. Plaintiff sets forth in his complaint six separate claims for relief: breach of contract, unfair and deceptive trade practices, breach of duty to act in good faith and deal fairly, fraud, wilful infliction of mental and emotional distress and the tort of outrage.

On 29 May 1987, defendant filed a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted. Subsequently, on 7 August 1987, defendant filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56. On 24 August 1987, the lower court granted defendant's Rule 12(b)(6) motion as to all plaintiff's claims for relief except the breach of contract action and also entered an order denying defendant's summary judgment motion as to that remaining claim. Plaintiff appeals the court's dismissal of the five claims for relief.

Brenton D. Adams for plaintiff-appellant.

W. Brian Howell for defendant-appellee.

SMITH, Judge.

Initially, we note that the record before us was settled by court order pursuant to App. R. 11(c). This order was signed by Superior Court Judge Donald Stephens. G.S. 1-283 provides:

[O]nly the judge of superior court or of district court from whose order . . . an appeal has been taken is empowered to settle the record on appeal when judicial settlement is required. . . . Proceedings for judicial settlement when the judge empowered . . . to settle the record . . . is unavailable . . . shall be as provided by the rules of appellate procedure.

App. R. 36(b) states that "[w]hen . . . the authority to enter an order . . . is limited to a particular judge and that judge is unavailable . . . the Chief Justice will upon motion of any party designate another judge to act. . . . Such designation will be by order entered ex parte." In this case, the appeal was taken from

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an order entered by Judge Bailey. There is nothing in the record to indicate that the Chief Justice designated Judge Stephens to settle the record although Judge Stephens' order does recite that Judge Bailey was unavailable. Despite the absence of any showing that Judge Stephens was authorized to settle the record, this Court will consider the merits of plaintiff's appeal of the Rule 12(b)(6) dismissal since we are only required to examine the complaint in addressing the assignment of error.

Plaintiff brings forth as his sole assignment of error the trial court's dismissal of his claims for relief for unfair and deceptive trade practices, breach of duty to act in good faith and deal fairly, fraud, wilful infliction of emotional distress, and the tort of outrage. A motion to dismiss for failure to state a claim under G.S. 1A-1, Rule 12(b)(6) is the proper method for testing the legal sufficiency of a complaint. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). A complaint is sufficient if no insurmountable bar to recovery on the alleged claim appears on the face of the complaint and if the allegations are sufficient to give defendant notice of the nature of plaintiff's complaint to enable it to answer and prepare for trial. *Cassels v. Motor Co.*, 10 N.C. App. 51, 178 S.E. 2d 12 (1970). Only when it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of plaintiff's claim is dismissal proper. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). In considering a motion to dismiss, the court must view the complaint in the light most favorable to plaintiff and take all allegations as true. *Beasley v. National Savings Life Ins. Co.*, 75 N.C. App. 104, 330 S.E. 2d 207 (1985), *disc. rev. improvidently granted*, 316 N.C. 372, 341 S.E. 2d 338 (1986).

[1] Plaintiff alleged in his first dismissed claim for relief that defendant committed unfair and deceptive trade practices in violation of the provisions of G.S. 58-54.4(11) and G.S. 75-1.1. In order to establish a claim for relief under G.S. 58-54.4(11), plaintiff must allege not only that defendant engaged in the prohibited acts under the statute but also that defendant engaged in the prohibited acts "with such frequency as to indicate a general practice." G.S. 58-54.4(11); *Beasley, supra*. Plaintiff here failed to allege the latter; therefore, the trial court's dismissal pursuant to G.S. 1A-1, Rule 12(b)(6) was proper. *Id.*

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[2] Plaintiff's second claim for relief alleged that defendant breached its duty to act in good faith in refusing without reason to pay for private duty nurses and all doctor bills, refusing to adequately investigate plaintiff's claim and refusing to negotiate and settle plaintiff's claim. In this regard, plaintiff requested compensatory and punitive damages.

It is a general rule in North Carolina that punitive damages are not allowed for breach of contract, with the exception of breach of contract to marry. *Newton, supra*. However, if there is also an identifiable tort, even if the tort constitutes or accompanies a breach of contract, that tort may give rise to a claim for punitive damages. *Id.* Drawing a distinction between a malicious or oppressive breach of contract which does not allow an award for punitive damages and tortious behavior which constitutes or accompanies a breach of contract is difficult in practice but essential when considering punitive damages in contract cases. *Id.*

Our courts have previously held:

'The general rule in most jurisdictions is that punitive damages are not allowed even though the breach be wilful, malicious or oppressive. . . . Nevertheless, where there is an identifiable tort, even though the tort also constitutes, or accompanies, a breach of contract, the tort itself may give rise to a claim for punitive damages. . . .

Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed. . . . Such aggravated conduct was early defined to include "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness. . . ."

Payne v. N.C. Farm Bureau Mutual Ins. Co., 67 N.C. App. 692, 694, 313 S.E. 2d 912, 913 (1984), quoting *Newton v. Insurance Co.*, 291 N.C. 105, 111-12, 229 S.E. 2d 297, 301 (1976) (citations omitted). Such tortious acts may be established by allegations of behavior extrinsic to the tort itself—such as slander—or it may also be established by allegations sufficient to allege a tort which by its

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nature encompasses elements of aggravation—such as fraud. *Newton, supra.*

The *Newton* case did not reach the question of whether a bad faith refusal to pay a justifiable claim (as alleged here) gives rise to punitive damages. The court did acknowledge that had a claim been made that a defendant, in bad faith and with intent to damage plaintiff, refused to make any investigation then "a different question would be presented." *Id.* at 116, 229 S.E. 2d at 303.

Three subsequent Court of Appeals cases, however, did reach the issue of whether bad faith in either refusing to provide insurance coverage or refusing to pay a justifiable claim gives rise to a claim for punitive damages. In *Payne, supra*, and *Dailey v. Integon Ins. Corp.*, 57 N.C. App. 346, 291 S.E. 2d 331 (1982), *disc. rev. denied*, 314 N.C. 664, 336 S.E. 2d 399 (1985), the plaintiffs specifically alleged in part that the defendants acted in bad faith and that the defendants' conduct was wilful and malicious. In each instance these allegations were supported by specific examples of such conduct on the parts of the defendants. In both cases this Court held that the trial court erred in dismissing the plaintiffs' respective claims for relief alleging bad faith and that the plaintiffs had sufficiently alleged a tortious act accompanied by the requisite "element of aggravation." A different result was reached in *Beasley, supra*. In *Beasley*, the plaintiff merely alleged that defendant acted in bad faith in failing to pay plaintiff's valid claim. The Court stated: "Not only has plaintiff herein failed to sufficiently allege a tortious act, he has failed to allege any accompanying 'element of aggravation.' Therefore . . . we hold that the trial court did not err in dismissing plaintiff's claim for punitive damages based on bad faith . . . under G.S. 1A-1, Rule 12(b)(6)." *Id.* at 108-09, 330 S.E. 2d at 209.

In the case *sub judice*, plaintiff specifically alleged that despite the opinions of two of decedent's treating physicians regarding the necessity of nursing care, defendant refused to investigate the claim or consult a qualified physician for evaluation before denying the claim and that such refusal was in bad faith. Plaintiff further alleged that defendant refused to pay for private duty nursing care after it had previously approved that expense and communicated that approval to plaintiff. Such actions, plaintiff contended, were wilful, wanton and in conscious disregard of

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defendant's duty to pay plaintiff's insurance claim. In light of *Dailey* and *Payne*, we hold that the allegations in plaintiff's complaint are sufficient to support a claim for relief for bad faith and that the trial court erred in dismissing this particular claim for which plaintiff seeks punitive damages.

[3] Plaintiff's third claim for relief alleges that defendant's failure to pay benefits to which plaintiff was entitled constituted fraud. Plaintiff contends that defendant made false statements that defendant was not liable for nursing care costs because evidence showed that such care was not necessary. These statements were allegedly made with the intent that plaintiff would rely on the statements and with the intent to defraud. North Carolina requires that to establish a claim for relief for fraud plaintiff must allege that (1) there was a representation of a material past or present fact, (2) the representation was false, (3) defendant knew the representation was false or made the representation in reckless disregard of the truth, (4) the representation was made with intent that plaintiff rely on it, (5) plaintiff did in fact rely on the representation and acted upon it, and (6) plaintiff was damaged thereby. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). These allegations must be stated with particularity. G.S. 1A-1, Rule 9(b); *Payne, supra*. In this case, plaintiff failed to allege that he did rely on defendant's alleged false statements to his detriment. The only allegation plaintiff makes is that defendant intended for plaintiff to rely on its statements. This allegation is not enough. The lower court's dismissal of this particular claim for relief was therefore proper.

[4] Plaintiff's fourth claim for relief alleged that defendant wilfully and intentionally inflicted emotional distress in refusing to pay under the insurance policy when defendant knew of plaintiff's vulnerable physical and mental condition. This allegation is not enough. The complaint must allege that defendant demonstrated "calculated intentional conduct causing emotional distress directed toward [plaintiff]." *Beasley*, 75 N.C. App. at 110, 330 S.E. 2d at 210. Plaintiff has made no such allegation. Plaintiff has only alleged that defendant caused plaintiff emotional distress by refusing to pay plaintiff's valid claim for insurance benefits. An essentially similar allegation was made in *Beasley*. The court there, in holding that plaintiff's allegations were insufficient, noted:

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A contract of insurance . . . is a commercial transaction, and absent allegations of specific facts which if proved would demonstrate calculated intentional conduct causing emotional distress directed toward a claimant, a complaint for insurance benefits alleging intentional infliction of emotional distress will not withstand a motion to dismiss under Rule 12(b)(6).

Id. at 109-10, 330 S.E. 2d at 210. The lower court properly dismissed this claim for relief.

[5] Finally, plaintiff's complaint sought to allege the tort of outrage. We reaffirm the holding in *Beasley* that our jurisdiction does not recognize this particular tort. Therefore, the lower court was correct in dismissing this claim for relief.

Reversed in part, affirmed in part.

Judges JOHNSON and PHILLIPS concur.

J. T. MOORE, D/B/A HOME INSULATION & ACOUSTICAL CO. v. BOBBY DIXON ASSOCIATES, INC.

No. 875SC1170

(Filed 2 August 1988)

1. Accord and Satisfaction § 1— construction work—partial payment of final bill—accord and satisfaction—jury question

The trial court properly denied defendant's motions for directed verdict on its claim of accord and satisfaction where the evidence tended to show that plaintiff performed work for defendant and sent defendant a final bill; defendant disputed the amount of the bill, sent plaintiff a sheet showing all charges and amounts paid, and sent plaintiff a check for substantially less than the amount of the bill; defendant contended that the words "Completed Contract" and "Final" were written on the check; plaintiff cashed the check but could remember nothing about the words; he indicated that he did not know the check was for final payment; and the evidence therefore presented a jury question as to whether there was an accord and satisfaction.

2. Accord and Satisfaction § 1— check deposited—accord and satisfaction as matter of law—instruction not required

The trial court was not required to instruct that plaintiff's deposit of defendant's check tendered as payment in full of a disputed claim constituted an accord and satisfaction as a matter of law, since the facts were in dispute as to

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whether the check was for final payment and whether the words "Final" and "Completed Contract" appeared on its face; the relevant inquiry was whether acceptance of this particular check constituted an accord and satisfaction; and this was a question of fact which was properly submitted to the jury.

3. Accord and Satisfaction § 1— requested instruction not given—no error

The trial court was not required to add defendant's requested instruction on the issue of accord and satisfaction where defendant wanted an instruction that "the cashing of a check tendered in full payment of a disputed claim establishes accord and satisfaction as a matter of law . . ."; the facts of this case presented a question for the jury on whether defendant's check was tendered in full payment of the disputed claim; and the trial judge had already stated the law on accord and satisfaction through extensive instructions.

APPEAL by defendant from *Small, Judge*. Judgment entered 5 August 1987 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 May 1988.

William R. Shell for plaintiff appellee.

Lanier & Fountain, by Gordon E. Robinson, Jr., for defendant appellant.

COZORT, Judge.

Plaintiff filed this action to recover money due from defendant for work he performed on defendant's construction project. From a judgment entered in plaintiff's favor, defendant appeals. We affirm.

On 18 January 1985, plaintiff subcontracted with defendant to perform the sheetrock and insulation work on the St. Regis Resort at Topsail Island, North Carolina, for \$510,000.00. The contract provided that defendant could order changes without invalidating the contract and that, if it did so, the contract sum would be adjusted accordingly. The contract also provided that progress payments were to be made on the tenth day of each month and that final payment would be made on the tenth day of the month following the completion of the subcontract work. Defendant paid plaintiff's first seven requests for payment in full. Yet, payments made on request numbers 8 and 9 were short a total of \$59,904.00. On 25 November 1985, plaintiff submitted a final bill for \$85,658.06 which included the amount owing on the original contract price as well as the cost of various change orders and extras requested by defendant throughout the course

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of the project. When defendant received the bill, its president, Bobby Dixon, called plaintiff and contested the amount due. Dixon then sent plaintiff a recapitulation sheet on 12 December 1985 listing the change orders on the bill which he would honor, the amount he had already paid, and a list of offset items which plaintiff had never performed. The recapitulation sheet showed a total balance due of \$29,105.26, and defendant sent plaintiff a check for that amount.

Plaintiff deposited this check and then filed suit against defendant for \$56,552.80, the amount he contended was still due on the contract. Defendant answered the complaint and alleged that the tender and acceptance of its check for \$29,105.26 by plaintiff constituted an accord and satisfaction. At trial, Dixon testified that he had written "Completed Contract," the job number, "S.R. 2" and "Final" on the face of the check before mailing it. However, when the cancelled check came back to defendant, the words "Completed Contract" and "Final" had been marked through. Plaintiff testified that he read the recapitulation sheet and deposited the check, but that he could not remember whether the words "Completed Contract" and "Final" were marked through when he received it. He also testified that he did not scratch through the words and that he never would have deposited the check with the word "Final" written on it, since he was still owed almost \$57,000.00. At the close of plaintiff's evidence and again at the close of all of the evidence, defendant moved for a directed verdict; both motions were denied. When the jury returned a verdict for plaintiff in the amount of \$44,504.72, plus interest, defendant moved for a judgment notwithstanding the verdict, which was also denied. From the denial of its motions and the judgment entered against it, defendant appeals.

[1] Defendant first argues that the trial court erred in denying its motions for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence. We disagree.

The question presented by a motion for a directed verdict is whether the evidence, when considered in the light most favorable to the nonmovant, is sufficient for submission to the jury. *Kelly v. International Harvester Co.*, 278 N.C. 153, 157, 179 S.E. 2d 396, 398 (1971). Any discrepancies and contradictions in the evidence are to be resolved by the trier of fact. *Naylor v. Naylor*,

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11 N.C. App. 384, 386, 181 S.E. 2d 222, 224 (1971). Only when the evidence is insufficient to support a verdict in the nonmovant's favor is the motion properly granted. *Snow v. Duke Power*, 297 N.C. 591, 596, 256 S.E. 2d 227, 237 (1979).

In the case below, we find the trial judge properly denied defendant's motions for a directed verdict. There were contradictions in the evidence concerning the existence of an accord and satisfaction.

"An accord and satisfaction is compounded of two elements: An accord, which is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, something other than or different from what he is or considers himself entitled to; and a satisfaction, which is the execution or performance of such agreement."

Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 349, 167 S.E. 2d 85, 90 (1969) (quoting 1 Strong, N.C. Index 2d, *Accord and Satisfaction*, § 1 at 30). "The word "agreement" implies the parties are of one mind—all have a common understanding of the rights and obligations of the others—there has been a meeting of the minds. (Citations omitted.)" *Id.* at 350, 167 S.E. 2d at 91 (quoting *Prentzas v. Prentzas*, 260 N.C. 101, 131 S.E. 2d 678 (1963)). The existence of an accord and satisfaction is ordinarily a question of fact for the jury, unless undisputed facts reveal that the only reasonable inference is its existence or its nonexistence. *Sharpe v. Nationwide Mut. Fire Ins. Co.*, 62 N.C. App. 564, 565-66, 302 S.E. 2d 893, 894, cert. denied, 309 N.C. 823, 310 S.E. 2d 353 (1983). "When there is some indication on a check that it is tendered in full payment of a disputed claim, the cashing of the check is held to be an accord and satisfaction as a matter of law." *Sanyo v. Albright Distributing Co.*, 76 N.C. App. 115, 117, 331 S.E. 2d 738, 740, disc. rev. denied, 314 N.C. 668, 336 S.E. 2d 496 (1985).

At the close of plaintiff's evidence, the only evidence before the judge was as follows: Plaintiff testified that all of the change orders had been approved by defendant's job superintendent and that the total amount due on the contract after the change orders were included was \$85,658.00. Plaintiff also testified that he and Dixon discussed the amount of the final bill and that Dixon had

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said that as soon as several items were completed, he would pay plaintiff "every penny." Plaintiff admitted that he received the recapitulation sheet and check sent by Dixon and that he read over the recapitulation sheet before cashing the check. He also said that he did not know if the words "Completed Contract" or "Final" appeared on the check but that, if they did, he did not scratch through them. The check which was introduced into evidence shows that certain words were crossed out, but it cannot be determined what each of those words were. This evidence fails to show a meeting of the minds as to an accord and satisfaction, as plaintiff's evidence indicates that he did not know the check was for final payment. Therefore, the trial court correctly denied defendant's motion for a directed verdict at the close of plaintiff's evidence.

Dixon's testimony that he wrote "Completed Contract" and "Final" on the check before mailing it to plaintiff created a conflict in the evidence as to what words were written and legible on the check when plaintiff received and endorsed it. Since the facts are in dispute as to what was on the check and as to the existence or nonexistence of an accord and satisfaction, there was an issue of fact for the jury. We hold that the trial judge again properly denied defendant's motion for a directed verdict at the close of all the evidence.

[2] Defendant next argues that the trial court erred by erroneously stating the law on accord and satisfaction in its instructions to the jury. We disagree.

The first issue submitted to the jury was stated as follows:

Did the plaintiff accept an offer of settlement made by the defendant when he deposited the check of the defendant dated June 12, 1985 in the amount of \$29,105.26?

Defendant contends that the court should have stated that the deposit of the check tendered as payment in full of a disputed claim constituted an accord and satisfaction as a matter of law. We have already held that the facts here are in dispute as to whether the check was for final payment and whether the words "Final" and "Completed Contract" appeared on its face. The relevant inquiry is whether acceptance of this particular check con-

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stituted an accord and satisfaction. We hold that this was a question of fact which was properly submitted to the jury.

[3] Defendant next argues that the trial court erred in refusing to add its requested instruction on the issue of accord and satisfaction. We disagree.

After jury deliberations began, one of the jurors returned to the courtroom with the following question: "Does the cashing of a check which has 'Contract Completed, Final' typed on the face of the check constitute acceptance of payment in full by the payee under North Carolina law?" The trial judge responded to the question with the following instruction:

An accord is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim liquidated or in dispute and arising either from contract or tort, something other than or different from what he is or considered himself entitled to, and a satisfaction is the execution of the performance of such agreement.

The trial judge then stated, "What you have to decide is whether or not there was a dispute as to what was owed under the contract. Then decide whether or not an agreement was entered into to settle the dispute as to what was owed and that agreement was satisfied by the payment of money." Defendant excepted to this instruction and requested that the judge instruct the jury by quoting portions of *Sharpe v. Nationwide Mut. Fire Ins. Co.*, 62 N.C. App. 564, 302 S.E. 2d 893, cert. denied, 309 N.C. 823, 310 S.E. 2d 353 (1983). Defendant requested the following instruction:

The cashing of a check tendered in full payment of a disputed claim establishes accord and satisfaction as a matter of law, and that in such case the claim is extinguished regardless of any disclaimer which may be communicated by the payee.

As stated earlier, the facts of this case present a question for the jury on whether defendant's check was tendered in full payment of the disputed claim. The trial judge had already stated the law on accord and satisfaction through extensive instructions, and under the facts of this case there was no need to add defendant's requested instruction. Therefore, there was no error in denying defendant's request.

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Defendant next argues that the trial court erred in denying his motion for a judgment notwithstanding the verdict. We disagree.

The motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict actually returned by the jury. *Summey v. Cauthen*, 283 N.C. 640, 648, 197 S.E. 2d 549, 554 (1973). The standards for granting this motion are the same as those for granting a directed verdict. *Weyerhaeuser Co. v. Godwin Bldg. Supply*, 40 N.C. App. 743, 745, 253 S.E. 2d 625, 627 (1979).

Defendant's sole basis for arguing that the motion for judgment notwithstanding the verdict should have been granted is that the two earlier motions for a directed verdict were inappropriately denied. Having already determined that the two previous motions were appropriately denied, we find no error in the denial of this motion.

Defendant next argues that the trial court erred in awarding interest on the judgment. Defendant contends that since the award of principal was in error, the award of interest was also in error. We disagree.

An amount awarded on a breach of contract claim bears interest from the day of the breach. N.C. Gen. Stat. § 24-5. We hold that the award of principal in this case was proper. The award of interest from 12 December 1985, the date defendant refused to pay the final bill, was properly granted.

Finally, defendant argues that the trial court erred in signing and entering judgment in this matter. It contends that error of law appears on the face of the record, because the evidence established an accord and satisfaction as a matter of law. We disagree. An exception to the judgment or to the signing and entry of the judgment presents the face of the record proper for review. *In re: Wallace's Estate*, 267 N.C. 204, 207, 147 S.E. 2d 922, 924 (1966). Review by the appellate court is limited to the question of whether error of law appears on the face of the record and whether the judgment is regular in form and supported by the verdict. *Wilson v. Wilson*, 263 N.C. 88, 89, 138 S.E. 2d 827, 828 (1964).

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We have reviewed the record and find no error and hold that the judgment is supported by the evidence and the verdict.

Based on the foregoing, we find no error in the trial below.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

MARY CARPENTER PAYNE v. JERRY D. PAYNE

No. 8727DC1194

(Filed 2 August 1988)

1. Divorce and Alimony § 23— child custody and support—motion for change placed on regular domestic calendar—defendant not prejudiced

Defendant was not prejudiced where his motion for change of child custody and for child support was placed on the Regular Domestic Calendar rather than on the Expedited Calendar for Domestic Cases.

2. Divorce and Alimony § 24.9— plaintiff not required to support minor children—findings insufficient to support conclusion

The trial court's findings of fact were insufficient to support its conclusion that plaintiff should not be required to support her minor children where the court placed no monetary value on the needs of one child; the only finding bearing on plaintiff's ability to pay was that her expenses exceeded her income; and there were no findings upon which to conclude that defendant had the ability to support both his children.

3. Divorce and Alimony §§ 24, 25— child custody and support—affidavit of child—no consideration by court

In a hearing on defendant's motion for child custody and support, the trial court did not abuse its discretion in refusing to consider the affidavit of one of defendant's children where the affidavit was offered after defendant's motion to amend the judgment had been heard and without notice to plaintiff.

APPEAL by defendant from *Berlin H. Carpenter, Jr., Judge*, order entered 25 February 1987; and from *Timothy L. Patti, Judge*, orders entered 5 May 1987, and 30 July 1987. All orders were entered in District Court, GASTON County. Heard in the Court of Appeals 6 June 1988.

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Horace M. DuBose, III for plaintiff-appellee.

Charles J. Katzenstein, Jr., by R. Dennis Lorance, for defendant-appellant.

BECTON, Judge.

By virtue of a consent judgment entered 9 February 1982, plaintiff, Mary Carpenter Payne, was awarded custody of the parties' two minor children, and defendant, Jerry D. Payne, was ordered to pay \$65 per week for child support. The consent judgment was modified pursuant to defendant's motion on 19 December 1985, and as a result, the defendant was awarded primary custody of one of the parties' minor children. He was also ordered to pay \$220 in past due child support, and all future child support payments were stayed.

On 9 February 1987, defendant moved again for modification of the court's custody order, alleging that both children resided with him and seeking child support. The trial judge concluded that the case did not qualify for disposition on the Expedited Calendar for Domestic Court cases and scheduled a hearing on the Regular Domestic Calendar in March 1987.

On 5 May 1987, the trial judge awarded custody of both minor children to defendant but did not order plaintiff to "pay any specific amount of support." Defendant appeals from the trial judge's failure to schedule the case on the Expedited Domestic Calendar and from its 5 May 1987 order. We remand.

I

[1] We will first consider defendant's contention that this case should have been scheduled for hearing on the Expedited Calendar for Domestic cases. Chapter 50, Article 2 of the North Carolina General Statutes provides specific guidelines for disposing of all child support cases expeditiously. N.C. Gen. Stat. Sec. 50-36(a) provides that expedited procedures shall apply to all child support cases in any judicial district or county in which an expedited process has been established. Gaston County has an expedited calendar for domestic cases.

In the instant case, defendant filed his motion for modification of the custody order on 9 February 1987. On 5 May 1987, the

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trial judge entered an order finally disposing of the case. Plaintiff argues that because this began as a child custody case, it did not qualify for expedited process as a child support case, and the trial judge correctly scheduled it for hearing on the Regular Calendar.

Assuming, *arguendo*, that this case relates mainly to child support and thus qualified for expedited process under Chapter 50, Article 2, we fail to see how defendant was prejudiced by the court's placement of this case on the Regular Domestic Calendar. Section 50-32 provides, in relevant part, that "[e]xcept where paternity is at issue, in all child support cases the district court judge shall dispose of the case from filing to disposition within 60 days . . ." The case was originally scheduled for hearing during the 27 March 1987 session of Domestic Court. The case was continued on 8 April 1987 which was within the 60 day requirement of N.C. Gen. Stat. Sec. 50-32. This assignment of error is overruled.

II

We now turn to defendant's assignments of error regarding the custody order. This custody struggle involves the parties' two minor children—Amy and Angie Payne. In its 19 December 1985 order, which was not appealed, the trial judge awarded plaintiff custody of Amy Payne and awarded defendant custody of Angie Payne. Neither party was required to pay child support, and they were to share medical expenses equally.

Upon a hearing in response to defendant's motion to modify the December 1985 order, the trial judge awarded custody of Amy Payne to defendant as well, after finding that Amy had moved into defendant's home in defiance of the December 1985 order. The trial judge then concluded "[t]hat while the plaintiff owes a duty of support for Angie Payne and Amy Payne, because of her current income and expenses, she should not be ordered to pay any specific amount of support at this time."

Defendant raises three issues on appeal regarding the custody order: 1) whether the trial judge erred by failing to make detailed findings of fact as required by N.C. Gen. Stat. Sec. 50-13.4(b) and (c), and by finding facts that conflicted with the evidence; 2) whether the trial judge erred by concluding that the plaintiff did not have the means or ability to pay child support;

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and 3) whether the trial judge erred by failing to consider Amy Payne's affidavit.

A

[2] Defendant's first two contentions are so intertwined that we will consider them together. Defendant essentially contends that the trial judge's findings of fact are inadequate to support its conclusion that plaintiff should not be required to pay child support.

The obligation to support children falls equally on both parents. N.C. Gen. Stat. Sec. 50-13.4(b) and (c) affords the trial judge a great deal of discretion in determining the amount of support a parent must pay. The trial judge may consider, among other things, the relative ability of the parents to provide support, or the inability of one to provide support, and the needs and estate of the child. Moreover, payments shall be in an amount needed to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, and accustomed standard of living of the child and the parties. These competing concerns were thoroughly addressed by our Supreme Court in *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980) in which the court noted that an order for child support "must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child', and (2) the relative ability of the parties to provide that amount." However, the trial judge's conclusions "must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and the parents. It is a question of fairness and justice to all concerned." *Coble*, 300 N.C. at 713, 268 S.E. 2d at 189 (citation omitted).

Applying the foregoing principles to the instant case, we note that the trial judge, in its 5 May 1987 and 30 July 1987 orders combined, found the following *summarized* facts to which defendant took exception:

- (6) Plaintiff resided with her mother; her expenses totaled \$1,065.50 per month, and her income totaled \$970 per month.

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(9) Defendant was remarried and resided with his wife and children, his expenses totaled \$1,818 per month, his income totaled \$1,748 per month, and he has additional income of approximately \$20 per week.

(13) Amy Payne has the needs of the average sixteen-year-old and these can be met only by defendant at this time.

(14) Plaintiff's expenses exceed her income and she has great credit card expenses caused in large part by the defendant's failure to pay court ordered child support in a timely manner, and she does not have either the present ability or resources to pay child support to defendant at this time.

The trial judge's best attempt to state the needs of Amy Payne was finding Number 13 in which the judge assessed her needs as those of the "average sixteen-year-old." Although an equation for child support does not lend itself to an exact mathematical calculation, it is difficult, if not impossible, to know whether a trial judge has made a complete and reasonable assessment of the child's needs and the parties' abilities to pay when the needs-variable has *no* monetary value. Notwithstanding its failure to quantify the child's needs, the trial judge concluded that plaintiff could not help satisfy them. The trial judge apparently based its conclusion that plaintiff did not have the present ability to pay support on its findings that her expenses exceeded her income and that her unwielding credit card obligations were caused by defendant's failure to pay \$220 in support to her in a timely manner when she had custody of both children. We find these facts insufficient. Defendant's \$220 delinquency in child support payments does not mean that plaintiff's expenses are reasonable. A "party's mere showing that expenses exceed income need not automatically trigger the conclusion that the expenses are reasonable or that the party is incapable of providing support." *Coble* at 714, 268 S.E. 2d at 190. There must be some assessment of the parent's expenses.

The necessary corollary to the finding that plaintiff cannot pay support is the conclusion that defendant alone can. Yet, the trial judge made no findings upon which to conclude that *defendant* had the ability to support both children. If expenses alone were the critical consideration, and we have already cautioned that it should not be unless the expenses are reasonable, then de-

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fendant's expenses were quite close to outweighing his income as well. Thus, we hold that the findings of fact are insufficient to support the conclusion that plaintiff should not be required to support her minor children.

We reiterate that the ultimate question is one of fairness and justice to all concerned, while keeping in mind that both parents have an equal obligation to support their children.

B

[3] In his final assignment of error, defendant contends that the trial judge erred by failing to include in the record and to consider Amy Payne's affidavit. After the trial judge entered its order of 5 May 1987, defendant moved to amend the judgment in accordance with Rules 52 and 59(a)(7) and (8) of the N.C. Rules of Civil Procedure, contending that the judgment was based on errors of law and on insufficient findings of fact. Plaintiff responded to the motion. Sometime thereafter, defendant offered the affidavit of Amy Payne. The trial judge amended his 5 May 1987 order but denied defendant's motion in all other respects.

Defendant's submission of the affidavit was procedurally flawed. The affidavit was offered after defendant's Rule 52 motion to amend the judgment had been heard and without notice to plaintiff. Moreover, we are convinced, from our reading of the record, that defendant sought only to amend the judgment based on the insufficiency of the evidence already offered and errors of law which occurred during trial, under Rule 59(a)(7) and (8) respectively. Thus, we hold that the trial court did not abuse its discretion in refusing to consider the affidavit of Amy Payne. This assignment of error is overruled.

In summary, we vacate the judgment and remand for further findings of fact and conclusions of law consistent with this opinion.

Vacated and remanded.

Judges WELLS and PHILLIPS concur.

Rosby v. General Baptist State Convention

DAVID K. ROSBY, PLAINTIFF v. THE GENERAL BAPTIST STATE CONVENTION OF NORTH CAROLINA INC. AND DR. C. C. CRAIG, DEFENDANTS

No. 8810SC7

(Filed 2 August 1988)

1. Master and Servant § 10— oral contract of employment—terminable at will

Plaintiff's oral contract of employment contained no provision governing the duration or termination of employment, and the employment relationship was therefore terminable at will.

2. Master and Servant § 8— employment contract—manual not part of contract

Defendant's employment manual did not become a part of plaintiff's oral contract of employment with defendant.

APPEAL by plaintiff from *Bowen, Wiley F., Judge*. Judgment entered 1 September 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 5 May 1988.

Irving Joyner for plaintiff-appellant.

James L. Lassiter; and Thigpen, Blue & Stephens, by Ralph L. Stephens, for defendants-appellees.

JOHNSON, Judge.

Plaintiff, David K. Rosby, instituted this civil action on 19 February 1986 to recover for breach of a contract of employment against his former employer, the Baptist State Convention. In count two of his complaint, plaintiff alleged that defendant number two, Dr. C. C. Craig, Executive Secretary/Treasurer of the Baptist State Convention, intentionally induced the Convention to breach its alleged contract of employment with plaintiff.

By way of answer, defendants denied the existence of a valid contract of employment, but described their professional relationship with plaintiff as an arrangement under which plaintiff would remain employed as long as his work was satisfactory to the Secretary/Treasurer of the Convention. Insofar as plaintiff's allegation of tortious interference with contract, defendant, Dr. Craig, answered that he had justification for his actions, and had documented plaintiff's specific acts of misconduct which led to his discharge. In addition, defendant, Dr. Craig, in his individual

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answer to the complaint, asserted a counterclaim against plaintiff for defamation.

The pertinent facts of the case appear as follows: On 1 March 1984 plaintiff was hired as Secretary of the Layman's League by the defendant, Convention, and continued in this capacity until employment termination on 13 January 1986. The parties had not entered into a written contract of employment, nor did they specify a definite term during which plaintiff was to be employed. At the time when plaintiff was hired, members of the Personnel Committee of the defendant, Convention, informed him that his actions were to be guided by certain personnel policies which they presented to him. The named personnel policies were adopted by the General Board in January 1984, but were not adopted by the full Convention until May 1984, two months after plaintiff had been hired.

In December of 1984, plaintiff filed a written grievance with defendant, Dr. Craig, concerning work-related issues. The grievance procedure employed was in keeping with that set forth in the 1984 personnel policies manual. Pursuant to procedure, plaintiff's letter of grievance was referred to a special panel of members of the Layman's League who met and discussed the grievance.

On 13 January 1986, plaintiff was informed by letter from Dr. Craig that he was being relieved of all duties pending consideration of his employment situation by the Convention's Executive Committee. Plaintiff then requested a hearing to appeal this decision, and was notified by letter on 17 January 1986 that he was to attend a meeting of the Personnel Committee on 27 January 1986 in Winston-Salem, North Carolina. Plaintiff did not attend the meeting. Defendant, Dr. Craig, however, did attend, and reported his prior action in having relieved plaintiff of his duties. The Executive Committee, upon motion, ratified Dr. Craig's action and permanently relieved plaintiff of his employment duties.

At trial on the matter, the court determined that plaintiff commenced his employment without benefit of a specific term or duration of employment; that certain personnel policies were in effect at that time, but were not incorporated into any employment agreement; and that the actions of neither plaintiff nor defendant, Dr. Craig, had been committed with malice. The court

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then ordered that plaintiff recover nothing of the defendants and that defendant, Dr. Craig, recover nothing of the plaintiff on the counterclaim. From this order plaintiff appeals.

By this appeal plaintiff requests that we consider (1) whether the trial court erred by ruling that the Convention's personnel policies were not incorporated into his alleged oral contract of employment; (2) whether the Convention breached its alleged contract of employment with plaintiff by refusing to grant his appeal as per the personnel policy directive; (3) whether defendant, Dr. Craig, caused the breach of the alleged employment contract by refusing to comply with the personnel policies; and (4) whether defendants presented any evidence to refute the material facts presented in plaintiff's behalf. Upon consideration of these questions we find that the trial court committed no error.

Two dispositive issues, simply stated, determine this case on review. They are: (a) whether the oral contract of employment which existed between plaintiff and defendant was for a specific duration; and (b) whether the defendant's personnel policies were incorporated into the alleged oral contract. We note here that although an answer in the negative to question (a) will make it unnecessary to consider question (b), we shall consider both issues.

[1] The response to question (a) is grounded in well-established precedent in our jurisdiction. The authoritative principle is that where a contract of employment, whether oral or written, contains no provision which governs the duration or termination of employment, the employment relationship is terminable at the will of either party. *King v. Seaboard Air Line Railway*, 140 N.C. 433, 53 S.E. 237 (1906); *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436 (1943); *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E. 2d 357 (1987).

Although well-settled, this rule has become subject to certain specific and strictly defined exceptions. They include protection for terminable-at-will employees who engage in protected activities such as: (a) seeking benefits by filing a workers' compensation claim provided for in G.S. 97-6.1; (b) instituting or causing to be instituted an Occupational Safety and Health Act proceeding, or (c) engaging in labor union functions. *Harris, supra*, at 629, 356 S.E. 2d at 359 (citations omitted). It is also possible to remove a

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traditionally labeled at-will employee from the unprotected realm where the employee has furnished additional consideration in assuming the position. *Id.*, citing, *Sides v. Duke Univ. Hospital*, 74 N.C. App. 331, 328 S.E. 2d 818, disc. rev. denied, 314 N.C. 331, 333 S.E. 2d 490 (1985).

In an action for breach of a contract of employment, it is essential that the existence of a contract for a specific duration be first established to allow inquiry on the other issues raised to proceed; such as in the case *sub judice*, whether the employer's policy provisions were incorporated into such an agreement. See, *Wilkinson v. Erwin Mills*, 250 N.C. 370, 108 S.E. 2d 673 (1959). In addition, the burden to establish the specific duration of an employment contract lies with the employee. *Freeman v. Hardee's Food Systems, Inc.*, 3 N.C. App. 435, 165 S.E. 2d 39 (1969).

Applying these principles to the employment situation at bar, we are convinced that the employee, David Rosby, has failed to carry his burden of establishing the existence of a contract of employment for a specific duration, and thus we affirm the judgment entered by the trial court. In his testimony at trial, plaintiff admitted that no specific term of employment was presented to him at the time of his hiring. He testified as follows:

Q: Do you have a contract showing the date that you started work and what salary and for what period of time that you were to be employed?

A: Do I have a contract showing that?

Q: Yes.

A: No I do not.

Although we are mindful of plaintiff's able argument that a valid contract may exist without the benefit of a writing, *Little v. Poole*, 11 N.C. App. 597, 182 S.E. 2d 206 (1971), the evidence presented at trial to establish the oral contract in question contained no allegation whatsoever that a provision addressing the element of duration had been included. In fact, plaintiff, throughout his argument, fails to address this vital requirement. Plaintiff also has failed to demonstrate that his situation falls within the protections of any of the recognized exceptions to the terminable-at-will rule. *Harris, supra*. See also, *Sides v. Duke, supra*.

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[2] In regard to dispositive question two, which comprises the bulk of plaintiff's argument, that the employment manual became a part of his oral contract, and the employer was thus held to its provisions concerning termination contained therein, we similarly find that plaintiff is entitled to no relief. It has been clearly decided in this jurisdiction that "unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it." *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 259, 335 S.E. 2d 79, 83-84 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E. 2d 39 (1986).

In support of his argument plaintiff contends that:

the General Baptist State Convention's personnel policies were presented to David Rosby by the Personnel Committee when he was hired. Members of the Personnel Committee told Rosby that the personnel policies were to be his "work bible," and it was the Committee's intent that Rosby's employment be governed by those policies. The personnel policies presented to Rosby contained a salary scale, the conditions of employment, the expected conduct of the employer and the employee, and the procedures to be followed to appeal disciplinary actions. The procedure for disciplinary actions directed against David Rosby were to be in compliance with the dictates of the 1984 personnel policies.

While we are sensitive to the "strong equitable and social policy reasons militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice" as enunciated in *Westinghouse, supra*, at 259, 335 S.E. 2d at 83 (1985), we find that in the case *sub judice*, the material contained within the manual was neither inflexible nor all-inclusive on the issue of termination procedures. The manual, although presented as plaintiff's "work bible" when he was hired, was not expressly included within his terminable-at-will contract.

We also note that although not to the letter, defendants attempted to follow policy mandates by allowing plaintiff an opportunity to be heard concerning his termination. Plaintiff, however, declined this invitation by failing to appear as scheduled.

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Therefore, we hold that the contract was terminable at will, as it contained no specified term or duration; the contract could legally be terminated at any time by either party, a course which the defendant employer legally followed; and that the personnel policies did not become a part of plaintiff's contract.

Prior discussion upon the dispositive issues precludes any necessity for further consideration on the remaining questions plaintiff has raised. The judgment is therefore affirmed.

Affirmed.

Judges PHILLIPS and SMITH concur.

ANNIE B. TAYLOR v. JACK R. FOY AND CITY ELECTRIC COMPANY OF CHARLOTTE, INC.

No. 8726DC1216

(Filed 2 August 1988)

1. Appeal and Error § 39.1— failure to file record within 15 days after settlement — dismissal of appeal

An appeal is subject to dismissal because of appellants' failure to file the record on appeal within 15 days after it was settled. App. R. 12(a).

2. Attorneys at Law § 7.5— attorney's fees as part of costs— corporate defendant not "losing party"

The trial judge erred in awarding attorney's fees and expenses against the corporate defendant and in taxing those fees as a part of the costs, since no issues were submitted to the jury concerning liability of the corporate defendant, and the corporate defendant therefore could not be said to be a "losing party" against whom costs could be taxed pursuant to N.C.G.S. § 75-16.1.

Judge PHILLIPS dissenting.

APPEAL by defendants from *Brown (L. Stanley), Judge*. Judgment entered 24 July 1987 and filed 3 August 1987 in District Court, MECKLENBURG County. Heard in the Court of Appeals 10 May 1988.

Ferguson, Stein, Watt, Wallas & Adkins, P.A., by Yvonne Mims Evans, for plaintiff-appellee.

Kenneth W. Parsons for defendant-appellants.

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SMITH, Judge.

Plaintiff instituted this action alleging that defendant Jack R. Foy (Foy) owned controlling interest in the corporate defendant. Plaintiff also alleged that she had previously been the owner of certain real properties located in Mecklenburg County. In June of 1982, plaintiff conveyed one of the tracts to Albert Little and his wife and paid Foy \$1,000.00 for his assistance in having the lands surveyed. Plaintiff also told Foy she would pay him one-half of the proceeds from the sale of the remaining tracts if he would assist her in selling the properties. In connection with the sale to the Littles, Foy had plaintiff sign three separate deeds. Thereafter Foy inserted in one of the deeds the description of the remaining tracts and the name of the corporate defendant as grantee.

Plaintiff subsequently learned that her lands had been conveyed to the corporate defendant and confronted Foy who then assured her that she would receive one-half of the proceeds when the properties were sold. In August of 1984, the remaining lands were sold and plaintiff has not received any of the proceeds of the sale.

Plaintiff alleged that defendant Foy obtained the deed conveying her properties to the corporate defendant by false pretenses and misrepresentation and that Foy's actions constitute an unfair and deceptive trade practice. The trial court submitted the following issues to the jury which were answered as indicated:

1. Was the plaintiff, Annie B. Taylor, induced to execute the deed dated June 23, 1982 to City Electric Company of Charlotte, Inc. by the fraudulent representations of the defendant, Jack R. Foy?

ANSWER: No.

2. If so, in what amount has the plaintiff been damaged?

ANSWER:

3. Were the actions of the defendant Jack R. Foy in obtaining title to plaintiff's property done willfully and maliciously?

ANSWER:

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4. If so, what amount of punitive damages, if any, should be awarded to the plaintiff, Annie B. Taylor from defendant Jack R. Foy?

ANSWER:

5. Did the defendant, Jack R. Foy, misrepresent to the plaintiff, Annie B. Taylor, that she was signing several copies of a Warranty Deed to Albert and Jennie Little, when the defendant, Jack R. Foy knew that one of the deeds signed by the plaintiff transferred some of plaintiff's property to defendant, City Electric Company of Charlotte, Inc.?

ANSWER: YES.

6. Was the defendant Foy's conduct in commerce or did it affect commerce?

ANSWER: YES.

7. Was the plaintiff injured as a proximate result of defendant's conduct?

ANSWER: YES.

8. By what amount, if any, has plaintiff been injured?

ANSWER: \$250.00 Two Hundred and Fifty & no/100.

s/ DIANNE D. THOMAS

Jury Foreperson

The trial judge trebled the amount of damages found by the jury and ordered both Foy and the corporate defendant to pay plaintiff's attorney's fee and expenses for their unwarranted refusal to settle the case.

[1] Initially, we note that appellants have failed to comply with Rule 12(a) of the Rules of Appellate Procedure. That rule requires a record on appeal be filed with this Court "[w]ithin 15 days after the record . . . has been settled . . . but no later than 150 days after giving notice of appeal." App. R. 12(a). Counsel for the parties stipulated to the record on appeal on 20 November 1987. The record on appeal was not filed until 21 December 1987. The appeal is, therefore, subject to dismissal for failure to meet the 15-day requirement. However, as there has been no motion to dis-

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miss and the 150-day requirement was met, we exercise our discretion and hear the appeal of the corporate defendant “[t]o prevent manifest injustice.” App. R. 2. The appeal of the individual defendant is dismissed for failure to comply with the Rules of Appellate Procedure. *Walter Corporation v. Gilliam*, 260 N.C. 211, 132 S.E. 2d 313 (1963).

[2] The corporate defendant’s first assignment of error is to that portion of the lower court’s judgment taxing, pursuant to G.S. 75-16.1, attorney’s fees and expenses against it for unwarranted refusal to settle the case. In an extensive jury instruction conference, the trial judge repeatedly stated that no issues would be submitted to the jury concerning liability of the corporate defendant and no such issues were in fact submitted. Plaintiff’s counsel objected to this ruling. Yet plaintiff has not excepted to nor cross-assigned any error based upon the lower court’s ruling as required by App. R. 10(d). This rule is “designed to protect appellees who have been deprived . . . of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which [the] judgment was actually based.” *Stevenson v. Dept. of Insurance*, 45 N.C. App. 53, 56-7, 262 S.E. 2d 378, 380 (1980). Plaintiff, in her brief, seeks to argue a number of alternative bases to support that portion of the judgment taxing attorney’s fees and expenses against the corporate defendant. As plaintiff failed to except and cross-assign error to the failure of the trial judge to submit any issue relating to the liability of the corporate defendant, those questions are not properly before this Court.

The jury’s verdict was that plaintiff have and recover of the individual defendant the sum of \$250.00 in damages. The verdict was trebled pursuant to G.S. 75-16. The trial judge then entered judgment taxing attorney’s fees and expenses against both defendants. G.S. 75-16.1 allows recovery of attorney’s fees for a violation of G.S. 75-1.1. G.S. 75-16.1 provides in pertinent part:

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and

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payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to resolve the matter which constitutes the basis for such suit.

In the case *sub judice* the corporate defendant cannot be said to be a "losing party" within the terms of the statute since no verdict was returned against it. Therefore, the trial judge erred in awarding attorney's fees and expenses against the corporate defendant and taxing those fees as a part of the cost.

As to the individual defendant, appeal dismissed.

As to the corporate defendant, judgment vacated.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I dissent from the majority opinion in the following respects:

(1) Though neither defendant's appeal has merit, in my opinion, I do not agree that the rules of appellate procedure authorize the dismissal of either appeal because the record was not filed within 15 days after it was settled. The only thing that Rule 12(a), N.C. Rules of Appellate Procedure, explicitly mandates, as I read it, is that the record be filed within 150 days after notice. But even if the 15 days after settlement provision is "mandatory," as the majority states, not every appellate rule provision is of such importance as to warrant the dismissal of an appeal for its breach, and the portion of Rule 12(a) requiring the record to be filed within 15 days after it has been settled is such a minor and incidental provision. Indeed it is so minor and incidental that, so far as I can determine, none of our appellate judges have even suggested heretofore, much less held, that a breach of the provision justifies dismissal. To so hold now would only add an unnecessary and pointless obstacle to the processing of appeals for no good reason whatever.

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(2) If, however, appeals are dismissible at our discretion when the record is not filed within 15 days after it is settled there is no reason to waive the rule in favor of the corporate defendant whose only equity, according to the record and verdict, is that it knowingly benefited from its employee's rascality.

(3) Even though the judgment does not explicitly assess damages against the corporate defendant it is nevertheless a losing party under the statute and the circumstances involved, since the verdict established that it obtained the lot involved through the unfair dealing of its employee and plaintiff was damaged thereby. While the better course would have been to submit issues as to the company's liability, and why the court did not do so is beyond comprehension, the issues that were submitted and answered nevertheless establish as a matter of law that the corporation is jointly liable for plaintiff's damage.

(4) The corporate defendant's assignment of error does not properly raise the attorney's fee issue.

(5) The judge's findings and conclusions as to the fee are supported by the record, in my opinion, and should be upheld.

TOWN OF BEECH MOUNTAIN, ELLEN ANDERSON, CARL T. BROWNING AND WIFE, MARTHA BROWNING, JOHN W. EARNHARDT AND WIFE, PATRICIA W. EARNHARDT, GEORGE E. HANDLEY, JR. AND WIFE, KATHLEEN HANDLEY, DOUGLAS W. JACKSON AND WIFE, MARY LOU E. JACKSON, EDWARD L. MCKINZIE AND WIFE, JACQUELINE S. MCKINZIE, AND W. K. MIMS AND WIFE, FRANCES G. MIMS, PLAINTIFFS v. COUNTY OF WATAUGA, JAMES G. COFFEY, CARL FIDLER, LARRY STANBERRY, JAY L. TEAMS, DAVID J. TRIPPLETT, AS COMMISSIONERS OF WATAUGA COUNTY, AND HELEN A. POWERS, SECRETARY, N.C. DEPARTMENT OF REVENUE, AND C. C. CAMERON, BUDGET OFFICER FOR THE STATE OF NORTH CAROLINA, DEFENDANTS

No. 8824SC135

(Filed 2 August 1988)

1. Constitutional Law § 20; Taxation § 15— sales and use tax—distribution on per capita basis—no denial of equal protection

There was no merit to plaintiffs' contention that distribution of sales and use tax revenue on a per capita basis pursuant to N.C.G.S. § 105-472 denied them equal protection of the laws because it arbitrarily distinguished between

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residents who resided in the county for more than six months and those who did not, since the statute did not affect a suspect class, did not impinge on a fundamental right, and provided a reasonable means of returning revenues in an amount proportionate to those from whom they were collected.

2. Constitutional Law § 19.1; Taxation § 15 – distribution of sales and use tax revenue—per capita basis—right of interstate travel not burdened—no deprivation of constitutional privileges and immunities

The per capita method of distribution of sales and use tax revenue pursuant to N.C.G.S. § 105-472 did not burden the right of interstate travel and deprive out-of-state residents of their privileges and immunities under Article IV, Section 2 of the U.S. Constitution, though plaintiffs argued that the distribution scheme discouraged out-of-state residents from purchasing property in Beech Mountain because the town was forced to charge higher taxes and provide fewer benefits, since the statute did not treat nonresidents any differently from residents of North Carolina; both were taxed the same and received the same services; the statute in no way interfered with free migration into the State; and it did not deny plaintiffs any of the privileges and immunities guaranteed by the Constitution.

APPEAL by plaintiffs from *Lamm, Judge*. Order entered 8 December 1987 in Superior Court, WATAUGA County. Heard in the Court of Appeals 2 June 1988.

Smith, Patterson, Follin, Curtis, James & Harkavy by Michael K. Curtis for plaintiff appellants.

Eggers, Eggers and Eggers by Stacy C. Eggers, III, and Womble Carlyle Sandridge & Rice by Anthony H. Brett for defendant appellees, Watauga County and the Commissioners of Watauga County.

Attorney General Lacy H. Thornburg by Assistant Attorney General Newton G. Pritchett, Jr., for defendant appellees, Helen A. Powers, Secretary, N.C. Department of Revenue and C. C. Cameron, Budget Officer of the State of North Carolina.

COZORT, Judge.

Plaintiffs filed a complaint to contest the constitutionality of defendant Watauga County's method of sales and use tax revenue distribution. Defendants answered and filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). From the order allowing the motion, plaintiffs appeal. We affirm.

The plaintiffs in this action include the Town of Beech Mountain and certain of its full-time residents, part-time residents from

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other North Carolina counties and part-time residents from other states. They filed this action to enjoin defendants from distributing Watauga County's sales tax revenues on a per capita basis. They also requested a ruling declaring the per capita method of distribution unconstitutional.

Pursuant to N.C. Gen. Stat. § 105-472, a county may distribute to its municipalities its local sales and use tax revenues on an ad valorem or per capita basis. For the fiscal years prior to and including 1986-87, Watauga County distributed its local tax revenues on an ad valorem basis, but in that year the County changed to a per capita method of distribution. Under this method, a town's population equals the number of residents who reside there for more than six months of the year. Plaintiffs allege that changing the method of distribution has dramatically reduced the amount of revenues it receives, because the majority of its residents are vacation homeowners who reside there for less than six months of the year. As a result of the new method of distribution, plaintiffs allege that Beech Mountain has been forced to raise city taxes and reduce services for all residents.

After plaintiffs filed their action, defendants answered and filed a motion to dismiss pursuant to Rule 12(b)(6). The motion was granted and plaintiffs appealed, arguing that the trial court erred in granting the motion, because the per capita method of distribution: (1) denies plaintiffs the equal protection of the law; (2) violates plaintiffs' rights to travel; and (3) deprives plaintiffs of their privileges and immunities under Article IV, Section 2 of the United States Constitution. We affirm the trial court's order.

A motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint, *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E. 2d 161, 163 (1970), which will be dismissed if it is completely without merit. *Lee v. Paragon Group Contractors*, 78 N.C. App. 334, 337, 337 S.E. 2d 132, 134 (1985). Where it appears to a certainty that plaintiffs are entitled to no relief under any state of facts which could be proved in support of the claim, dismissal for failure to state a claim upon which relief can be granted is proper. *Alamance Co. v. Dept. of Human Resources*, 58 N.C. App. 748, 750, 294 S.E. 2d 377, 378 (1982).

[1] N.C. Gen. Stat. § 105-472 provides for the distribution of revenues generated by the local sales and use taxes to each coun-

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ty from which it is collected. This statute provides that every year the board of county commissioners for each county may decide whether to distribute their proceeds from the tax on an ad valorem or a per capita basis. The ad valorem method allocates revenues to the county's municipalities based upon the percentage of the county's taxable property located within each municipality. Under the per capita method each municipality receives that percentage of revenues equal to the percentage its population bears to the entire population of the county. Population under this method is determined by the address each person lists as his usual residence, where he usually eats, sleeps and works. The effect of this classification is that a town's population consists of only those residents who reside there for more than six months. Plaintiffs argue that this method of distribution denies them the equal protection of the laws, because it arbitrarily distinguishes between residents who reside in the county for more than six months and those who do not. We disagree.

The Equal Protection Clause is not violated merely because a statute classifies similarly situated persons differently, so long as there is a reasonable basis for the distinction. See *In re Assessment of Taxes Against Village Publishing Corp.*, 312 N.C. 211, 220-21, 322 S.E. 2d 155, 162 (1984). When a statute is challenged on equal protection grounds, it is subjected to a two-tiered analysis. The first tier, or "strict scrutiny" provides the highest level of review and is employed only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Id.* at 221, 322 S.E. 2d at 162. To survive this level of review, the government must demonstrate that the classification created by statute is necessary to promote a compelling government interest. *Id.* A class is suspect "when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E. 2d 142, 149 (1980).

If a statute does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the statute is analyzed under the second tier and the government need only show that the classification in the challenged statute

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has some rational basis. *In re Assessment of Taxes Against Village Publishing Corp.*, 312 N.C. at 221, 322 S.E. 2d at 162. A statute survives analysis under this level if it bears some rational relationship to a conceivable, legitimate interest of government. *Id.* Statutes subject to this level of review come before the Court with a presumption of constitutionality. *White v. Pate*, 308 N.C. 759, 767, 304 S.E. 2d 199, 204 (1983).

Plaintiffs attempt to argue that out-of-county and out-of-state property owners in Beech Mountain are a suspect class such that the statute under review is subject to strict scrutiny. We hold, however, that individuals owning a second or vacation home for less than half of a year are not a suspect class. They are not " saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." *Texfi Industries*, 301 N.C. at 11, 269 S.E. 2d at 149.

Since the statute under review does not affect a suspect class and does not impinge on a fundamental right, it need only survive the rational basis test. Plaintiffs contend that the per capita method of distribution provided by statute bears no rational basis to a legitimate state objective.

We have examined the portion of the statute in question and hold that it bears a rational basis to the legitimate government objective of providing a means to allocate revenues among the counties' municipalities. The purpose of imposing the sales and use tax is to provide counties and municipalities with an additional source of revenue. N.C. Gen. Stat. § 105-464 (1985). The per capita method of distribution provides a reasonable means of returning revenues in an amount proportionate to those from whom they were collected. We hold that this method of revenue distribution is constitutionally valid and survives the rational basis test under the Equal Protection Clause.

[2] Plaintiffs also contend that the per capita method of distribution burdens the right of interstate travel and deprives out-of-state residents of their privileges and immunities under Article IV, Section 2 of the Constitution. They argue that the distribution scheme discourages out-of-state residents from purchasing proper-

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ty in Beech Mountain, because Beech Mountain is forced to charge higher taxes and provide fewer benefits. We disagree.

"[T]he right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." *Zobel v. Williams*, 457 U.S. 55 n.6, 60, 72 L.Ed. 2d 672, 677-78, 102 S.Ct. 2309, 2313 (1982). "Article IV, § 2, of the Constitution provides that the 'citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'" *S. Ct. of New Hampshire v. Piper*, 470 U.S. 274, 279, 84 L.Ed. 2d 205, 210, 105 S.Ct. 1272, 1275-76 (1985). This provision provides that for those privileges and immunities which are fundamental, a state must afford equal treatment to residents and nonresidents. *Id.*

The statute in the case at bar does not treat nonresidents any differently than it treats residents of North Carolina. Out-of-state property owners in Beech Mountain are taxed the same and receive the same services as full-time residents of Beech Mountain and part-time residents from other counties in North Carolina. The statute in no way interferes with free migration into the State nor does it deny plaintiffs of any of the privileges and immunities guaranteed by the Constitution. Therefore, we hold that these arguments are without merit.

We hold that the order of the trial court granting defendants' motion to dismiss should be affirmed.

Affirmed.

Judges JOHNSON and PARKER concur.

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DOUGLAS P. DETTOR AND WIFE, ELIZABETH K. DETTOR v. BHI PROPERTY COMPANY NO. 101, A LIMITED PARTNERSHIP; AND BORUM AND ASSOCIATES, INC., AND MARVIN L. BORUM

No. 8818SC113

(Filed 2 August 1988)

Reformation of Instruments § 7— conveyance of more property than intended by parties— overage to be reconveyed to seller

Since a deed by mutual mistake of the parties conveyed a tract embracing almost five acres more than originally contemplated, the trial court could properly reform the deed to reflect the original intent to convey approximately twelve acres by ordering the return to plaintiffs of the amount of acreage in excess of the erroneous survey.

Judge PHILLIPS dissenting.

APPEAL by plaintiffs from *Mills, F. Fetzer, Judge.* Orders entered 20 November 1986 and 19 October 1987 in GUILFORD County Superior Court. Heard in the Court of Appeals 8 June 1988.

Following negotiations through a real estate broker, plaintiffs entered into a contract with defendant BHI Property Company No. 101 (BHI) for the sale and purchase of a parcel of real property in Guilford County. The contract contained the following pertinent provisions:

REAL PROPERTY: . . . more particularly described as $\frac{1}{12}$ acres and highlighted in yellow on Exhibit A attached hereto, and more particularly described on Exhibit B attached hereto.

PURCHASE PRICE: The purchase price is \$225,000.00 (\$18,750 per acre) . . .

The property shall be surveyed by a North Carolina Registered Surveyor at the expense of the Sellers and a copy of the current survey is to be provided by the Sellers to Buyer at least 10 days prior to closing. Property is to have approximately 12 acres as shown on "Exhibit A" attached hereto.

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The purchase price of the 12 acre tract is to be adjusted by Eighteen Thousand, Seven Hundred Fifty (\$18,750.00) Dollars per acre, up or down, using the difference in actual acreage and 12 acres, and the balance of said purchase price is to be paid to the Sellers at closing. . . .

. . .

The 12 acre tract proposed to be conveyed by the Sellers to the Buyer by this Contract, is a portion of a larger tract. . . .

A survey was subsequently made by defendant Borum and Associates, Inc. (Borum), who was employed by plaintiffs. The Borum survey indicated that the parcel to be conveyed contained 12.365 acres, and the purchase price was adjusted from \$225,000.00 to \$231,843.75. Plaintiffs conveyed the parcel to BHI by a deed which contained a description based on the survey. Several months after the conveyance, BHI discovered that the conveyed parcel actually contained 17.147 acres.

Plaintiffs subsequently commenced this action seeking, *inter alia*, reformation of the deed to defendant BHI to reflect the conveyance of 17.147 acres, instead of the 12.365 acres, and specific performance of BHI's contractual obligation to pay for the additional acreage received by the deed. BHI answered admitting the contract for the purchase and sale of real estate and that title to the subject property had passed, but asserting multiple counterclaims, and praying that the court either rescind the contract and conveyance, reform the deed to include only 12 acres, or leave the transaction undisturbed.

The parties subsequently filed cross-motions for summary judgment, and a hearing was held on 6 October 1986. On 20 November 1986 the court entered an Order denominated Partial Summary Judgment wherein it found as facts, *inter alia*, that "the parties agreed to the purchase and sale of a tract . . . that was to consist of approximately 12 acres" and that said tract was later, after closing, discovered to contain 4.782 acres more than anticipated. The court concluded that the parties' contract had been entered into under a "mutual mistake of fact," that plaintiffs' motion to reform was inequitable, that BHI's motion to rescind was inequitable, and that the parties "should be placed in as close a position as possible after consummation of the sale in order to

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fulfill the terms and provisions of their written contract." The court therefore, sitting in its equity capacity, directed the appointment of three commissioners to designate 4.782 acres to be reconveyed to plaintiffs.

By letter dated 29 April 1987 the commissioners reported their findings and recommendations to the court, and on 19 October 1987 the court entered an Order confirming the commissioners' report and the antecedent Partial Summary Judgment and ordered defendant BHI to prepare and tender a deed to plaintiffs reconveying to them the 4.734 [sic] acres selected by the commissioners.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith and John A. Dusenbury, Jr., for plaintiff-appellants.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., for defendant-appellee.

WELLS, Judge.

In its 19 October Order confirming the commissioners' report and prior summary judgment the trial court stated that the Order constituted a final determination of all issues between plaintiffs and defendant BHI and that there was no just reason to delay a decision as to those issues. This appeal is therefore properly before us. See N.C. Gen. Stat. § 1A-1, Rule 54(b) of the Rules of Civil Procedure; *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92 (1980).

By entering partial summary judgment the trial court obviously concluded from its review of the exhibits, pleadings, and discovery materials that there was no genuine issue of material fact and that judgment should be rendered as a matter of law. We agree that there are no genuine issues of material fact. Further, by ordering the defendant to reconvey 4.782 acres to the plaintiffs the trial court in effect reformed the deed and contract to reflect an original intent to convey approximately 12 acres of land. Our review is limited to determining whether this reformation was proper.

Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the

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other, the written instrument fails to embody the parties' actual, original agreement. *See Light v. Equitable Life Assurance Society*, 56 N.C. App. 26, 286 S.E. 2d 868 (1982). Reformation on the ground of mutual mistake is available only where the evidence is clear, cogent, and convincing. *Id.*

In the present case the deed and contract for sale seem to evince, on the one hand, an intent to convey a specific tract of land, described in metes and bounds with definite boundaries, courses, and distances. On the other hand, the contract for sale manifestly reflects a mutual understanding by the parties that the tract conveyed shall contain approximately 12 acres. For example, provision no. 3 of the contract provides as follows:

3. The property shall be surveyed by a North Carolina Registered Surveyor at the expense of the Sellers and a copy of the current survey is to be provided by the Sellers to Buyer at least ten days prior to closing. Property *is to have approximately 12 acres* as shown on "Exhibit A" attached hereto. [Emphasis added.]

In accordance with the above-quoted term, the plaintiffs engaged defendant Borum to execute the survey, and prior to the closing, plaintiffs delivered to BHI a survey map, prepared by Borum and properly dated, on which the tract to be sold was stated to contain 12.365 acres.

The plaintiffs contend in their brief that the trial court erred in ordering reconveyance by defendant BHI of 4.782 acres, that the original intent, or actual agreement, of the contracting parties was to transfer a specific tract of land, with payment to be made on a per acre basis, and that as a matter of law the deed should be reformed to reflect a conveyance of an additional 4.782 acres, for which BHI should pay an extra \$89,662.50. We disagree. After careful consideration of the Record and briefs we conclude that the evidence is clear, cogent, and convincing that the heart of the parties' original agreement was the intent to convey approximately 12 acres.

The materials before the trial court showed that everyone involved in the negotiations assumed the subject parcel encompassed approximately 12 acres. For example, in his deposition of Mr. Fred L. Preyer, the realtor who represented BHI, plaintiffs'

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counsel asked Mr. Preyer if he had done any rough calculation of the property acquired from the plaintiffs. Mr. Preyer answered: "No. I had—frankly, I had assumed that it had been done, because this has been talked about for about six to seven months, *and everybody had constantly used the twelve-acre figure.*" (Emphasis added.) Since the deed by mutual mistake of the parties conveyed a tract embracing almost five acres more than originally contemplated, the trial court could properly reform the deed to reflect the original intent to convey approximately 12 acres by ordering the return to plaintiffs of the amount of acreage in excess of Borum's erroneous survey. We therefore overrule all of plaintiffs' assignments of error.

In light of the fact that plaintiffs not only hired the surveyor who miscalculated, but also apparently had in their possession an unrecorded map showing the acreage of the disputed tract to be just under 18 acres, we are constrained to observe that if the trial court erred at all in its equity decree, it did so in plaintiffs' favor. As plaintiffs themselves remind us in their brief, our State's courts are loathe to disturb executed conveyances of land. See *Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 217 S.E. 2d 551 (1975).

Affirmed.

Judge BECTON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

The real estate that the parties contracted to purchase and sell was distinctly and definitely identified on the map and description incorporated into the contract as all the land between a 10-acre tract on the north and a creek on the south. This in my view establishes as a matter of law that the parties contracted for the purchase and sale of a specifically described and identified tract of real estate and that the court had no authority to modify that agreement because of their misconception as to the size of the tract. Furthermore, "the approximately 12 acres" defendants were to receive were specifically identified as the entire tract. I would vacate the judgment and remand to the Superior Court for the entry of summary judgment for the plaintiffs.

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M. G. NEWELL COMPANY, INC. v. CONRAD WYRICK

No. 8718SC544

(Filed 2 August 1988)

1. Contempt of Court § 5.1— sufficiency of notice of contempt proceedings

There was no merit to defendant's contention that civil and criminal contempt adjudications were invalid because he had only five hours notice of the hearing for civil contempt rather than five days as required by N.C.G.S. § 5A-23(a) and no notice at all that his criminal contempt would be considered, since pursuant to the statute, the trial judge was authorized to shorten the notice period for good cause, and N.C.G.S. § 5A-23(g) expressly authorizes a judge conducting a hearing to determine civil contempt to "find the person in criminal contempt for the same conduct" upon making the required findings.

2. Contempt of Court § 7— punishment— excessive fine— no award of damages to private party allowed

The trial court erred in requiring defendant in a criminal contempt proceeding to pay \$3,150 in damages to plaintiff, since N.C.G.S. § 5A-12 limits the punishment which can be imposed to a fine of \$500 and 30 days in jail, and damages may not be awarded to a private party because of any contempt.

3. Attorneys at Law § 7.5— criminal contempt proceeding— defendant not required to pay plaintiff's attorney's fees

The trial court in a criminal contempt proceeding erred in requiring defendant to pay plaintiff's attorney's fees, since no statute authorizes the taxing of attorney's fees under the circumstances of this case.

4. Contempt of Court § 7— suspension of jail sentences— condition improper

Provisions in contempt adjudications suspending jail sentences imposed upon the condition that defendant not compete with plaintiff before 31 December 1988 were invalid, since the consent judgment which defendant violated provided for the non-competition term to end on 31 January 1988, and the court had no authority to extend the period beyond that agreed to and ordered.

APPEAL by defendant from *DeRamus, Judge*. Judgment entered 9 January 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 1 December 1987.

Plaintiff sells equipment and supplies used in processing milk, ice cream and pharmaceuticals, and on 30 November 1984 when defendant was its President the parties entered into an employment agreement in which defendant covenanted not to compete with plaintiff for two years after leaving its employment, which he did two and a half weeks later. On 3 February 1986,

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following correspondence between the parties about defendant converting certain of plaintiff's property and violating the non-competition agreement on certain occasions, this action was instituted and the parties signed a consent judgment in it. In the consent judgment defendant admitted that he had violated the covenant not to compete and owed plaintiff \$4,557.29 for converting its property and he consented to being enjoined from competing with plaintiff in a certain described territory until 31 January 1988. On 7 February 1986, by registered mail in compliance with Rule 4(j)(1)c, N.C. Rules of Civil Procedure, defendant was served with a copy of the summons and complaint alleging his breach of the non-competition agreement and conversion of plaintiff's property as stated in the consent judgment. On 12 February 1986 the consent judgment was signed by Judge Albright. On 29 August 1986, based upon allegations that defendant had violated the judgment by selling Coble Dairy Products Cooperative, Inc. in Lexington approximately \$2,200 worth of forbidden articles, plaintiff moved for an order for defendant to show cause why he should not be adjudged in contempt and a copy of the motion was served on him. On 17 September 1986 plaintiff served notice on defendant that it was going to take his deposition on 1 October 1986, but defendant objected upon the ground that plaintiff's purpose was to have him declared "to be in contempt of a lawful Order of Court" and moved for a protective order. By a response to plaintiff's show cause motion filed on 1 October 1986 defendant admitted that the consent judgment was entered on 12 February 1986 and pled as specific defenses only that "the Judgment was without consideration" and the motion endangered his rights against self-incrimination. On 30 December 1986 defendant was subpoenaed to appear in court and testify in this proceeding Monday morning, 5 January 1987, at 9:30, and he appeared at the designated time. After hearing both parties in regard to scheduling the show cause hearing, Judge DeRamus set the hearing for that afternoon at 3:30.

At the hearing defendant and several witnesses for the plaintiff testified, from which Judge DeRamus found that defendant had been and was wilfully violating the terms of the judgment and adjudged him to be in both civil and criminal contempt. For the civil contempt the judge ordered defendant's incarceration for an unspecified period but provided that he could purge himself by

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stating (1) in writing that he understood the nature and extent of plaintiff's business and the terms and conditions of the consent judgment and order; and (2) that he would not compete with plaintiff through 31 December 1988. For the criminal contempt the court sentenced defendant to the county jail for 30 days, but suspended the sentence and put defendant on probation until 31 December 1988 upon condition that he (a) pay plaintiff \$3,150 for commissions and profits earned in unlawfully competing with plaintiff's business; (b) pay a \$500 fine and the costs of court, including reasonable fees for plaintiff's counsel; (c) not violate the terms of the consent judgment before 31 December 1988.

Adams Kleemeier Hagan Hannah & Fouts, by Joseph W. Moss and George W. Jarecke, for plaintiff appellee.

Greeson, Allen and Floyd, by Harold F. Greeson, for defendant appellant.

PHILLIPS, Judge.

Of defendant's numerous contentions one is moot, as well as fanciful and farfetched—that his constitutional rights were abridged by being required to state in purging himself of civil contempt that he understood the consent judgment he had signed and the nature and extent of plaintiff's business which he used to run. And three more—that the trial court never had jurisdiction over him, consequently the consent judgment is void, and the contempt findings are invalid in any event because they are based just on "past acts"—are groundless on the face of the record. For even if the court had not already obtained jurisdiction over defendant by serving him with process by registered mail in compliance with Rule 4, as the record plainly indicates was done, by contesting both the notice to take his deposition and the show cause motion on grounds other than the court's lack of jurisdiction over him, defendant made a general appearance in the proceeding and thus submitted himself to the jurisdiction of the court, Rule 12(h)(1), N.C. Rules of Civil Procedure; *Blackwell v. Massey*, 69 N.C. App. 240, 316 S.E. 2d 350 (1984); and the court's findings of contempt, instead of being based just on past acts, as defendant argues, are explicitly based upon his continuing violation of the judgment to the day of the hearing, as his own testimony established.

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[1] Two more contentions—that both contempt adjudications are invalid because he had only five hours notice of the hearing for civil contempt, rather than five days as G.S. 5A-23(a) requires, and had no notice at all that his criminal contempt would be considered—are likewise without merit. As to civil contempt, G.S. 5A-23(a) in pertinent part provides:

The order or notice must be given at least five days in advance of the hearing *unless good cause is shown.* (Emphasis supplied.)

Thus, the judge was authorized to shorten the notice period for good cause, which he found upon undisputed facts to the effect that defendant had known for several months of the particular charges pending against him, had had ample opportunity to prepare to meet them, and all the witnesses, some of whom had been in court on earlier occasions, were present, along with the parties. Indeed, defendant's lawyer then, but not now, acknowledged to the court that he had had ample opportunity to discuss the charges with defendant and his argument for delaying the hearing was based, not upon any unreadiness to proceed, but upon his mistaken impression that a hearing upon less than five days notice was automatically invalid. Not only did the court have good cause for shortening the notice period but defendant could not have been prejudiced by it, since the purpose of notice is to enable the one charged to prepare his defense, *O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E. 2d 370 (1985), and defendant's own testimony, in which he admitted that he had been violating the judgment terms for months, showed that he had no defense. And as to the criminal contempt, under the circumstances defendant was entitled to no notice, as G.S. 5A-23(g) expressly authorizes a judge conducting a hearing to determine civil contempt to "find the person in criminal contempt for the same conduct" upon making the required findings.

[2-4] But defendant's contentions that three conditions the court required him to meet in order to purge himself of the contempts are invalid do have merit. *First*, the provision in the criminal contempt adjudication requiring defendant to pay \$3,150 in damages to plaintiff is invalid, because G.S. 5A-12 limits the punishment that can be imposed for criminal contempts of this type to a fine of \$500 and 30 days in jail; and in *Glesner v. Dembrosky*, 73 N.C.

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App. 594, 327 S.E. 2d 60 (1985), it was held that damages may not be awarded to a private party because of any contempt, which is an offense against the State. Though plaintiff argued otherwise in the brief it cited no authority for its position. *Second*, the provision in the criminal contempt adjudication requiring defendant to pay plaintiff's attorney's fees is also invalid; because under our law attorney's fees are taxable against a party only when authorized by statute, *United Artists Records, Inc., et al. v. Eastern Tape Corp.*, 18 N.C. App. 183, 196 S.E. 2d 598, cert. denied, 283 N.C. 666, 197 S.E. 2d 880 (1973), and no statute authorizes the taxing of attorney's fees under the circumstances recorded here. Nor for that matter are we aware of any North Carolina Court decision that might authorize the award. *Conrad v. Conrad*, 82 N.C. App. 758, 348 S.E. 2d 349 (1986), relied upon by plaintiff, does not apply as that case involved the enforcement of an equitable distribution award by *civil* contempt. *Third*, the provisions in both contempt adjudications suspending the jail sentences imposed upon the condition that defendant not compete with plaintiff before 31 December 1988 are also invalid. Since the consent judgment provided for the non-competition term to end on 31 January 1988 the court's authority was only to enforce that provision; it had no authority to extend the period beyond that agreed to and ordered. *Masterclean of North Carolina v. Guy*, 82 N.C. App. 45, 345 S.E. 2d 692 (1986). Though plaintiff again argued otherwise in the brief, no authority for its position was cited.

The judgment provisions held to be invalid are vacated and the rest of the judgment is affirmed.

Vacated in part; affirmed in part.

Judges WELLS and PARKER concur.

State v. Reynolds

STATE OF NORTH CAROLINA v. WILLIS WAYNE REYNOLDS**No. 8721SC1186**

(Filed 2 August 1988)

Criminal Law § 89.3— statement of co-conspirator—no weight or credibility added to trial testimony—statement inadmissible for corroboration

The trial court erred in admitting for corroborative purposes the prior statement of an alleged co-conspirator that defendant was very active in persuading him to commit a robbery, since the statement added neither weight nor credibility to his trial testimony that he was unable to remember if defendant even participated in the discussions concerning the robbery; furthermore, admission of the statement was prejudicial error, since it was the only evidence clearly identifying defendant as part of the conspiracy.

APPEAL by defendant from *Cornelius, Judge*. Judgment entered 9 July 1987 and order entered 11 December 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 May 1988.

Defendant was indicted and tried for conspiracy to commit armed robbery of the Mayflower Seafood Restaurant and for felony armed robbery of a Food Lion store. A jury found defendant guilty as charged. The trial court sentenced defendant to terms of ten years for the conspiracy conviction and fourteen years for the armed robbery conviction.

Thereafter, on the basis of newly discovered evidence, defendant filed a motion for appropriate relief requesting the trial court to set aside his convictions for conspiracy and armed robbery. The trial court granted defendant's motion in part by ordering a new trial on the charge of armed robbery. However, the trial court denied defendant's motion to set aside the conspiracy conviction. Subsequently, the State voluntarily dismissed the robbery charge based on evidence that another person had in fact committed the crime.

Defendant appeals from the judgment entering the conspiracy conviction and from the order denying his motion for appropriate relief.

Facts relevant to the issues on appeal will be included herein.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for the State.

Pfefferkorn, Pishko & Elliot, P.A., by Robert M. Elliot, for defendant-appellant.

ORR, Judge.

At trial the State presented the testimony of John Timothy Mullis to establish defendant's guilt of conspiring to rob the Mayflower Restaurant.

Mullis and another man, Adam Smith, confessed to committing the actual robbery of the Mayflower Seafood Restaurant on 20 January 1987. After confessing, Mullis, in return for a plea bargain sentencing arrangement, agreed to testify against defendant and his codefendant Alfred Hemric on the conspiracy charges.

At trial Mullis testified that on the afternoon of the Mayflower robbery he stopped by defendant's home to visit. After a short time, he and defendant went "riding" and met Adam Smith, who joined them. The three men returned to defendant's home and spent the next hour or so getting high. At approximately 6:00 to 6:30 p.m. that evening, Hemric joined defendant, Smith, and Mullis at defendant's home.

Mullis said a discussion began among the men as to whether or not they should rob a local appliance store. At which point, Hemric recommended they instead rob the Mayflower Restaurant for a "cash lick." Hemric told Mullis and Smith where the cash receipts were kept in the Mayflower Restaurant and admonished the two men not to kill anybody.

Mullis testified that after the conversation ended he, Smith, and Hemric left defendant at his home and went to Hemric's home to begin preparing for the robbery. After Smith and Mullis robbed the Mayflower Restaurant they returned to Hemric's, where Hemric divided the money giving \$1,100 each to Mullis and Smith and keeping the remaining \$3,500.

Mullis testified at trial that all conversation concerning robbing the Mayflower took place in defendant's home and in his presence. However, when asked on two occasions at trial if defendant had participated in the conversation concerning the

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robbing of the Mayflower, Mullis said, "I'm not sure. It was conversation involved but I don't know if he was talking about the Mayflower with us or not"; "I don't remember."

To corroborate Mullis's trial testimony the State introduced a statement made by Mullis on 29 January 1987, which said:

SPILLMAN: Tim, if you will, go ahead and tell us exactly, exactly how, how the uh, robbery took place, whose idea it was, how much money was got, and who, who, in fact was behind the whole situation. Scoot in a little closer here.

MULLIS: All right. Uh, I just went up to Willis's and he told me about the rob, told me about the setup and him and Al hyped it up and got, we were all getting high over at Willis's house and just, they just got me hyped up about it and . . .

SPILLMAN: Got you hyped up about what?

MULLIS: About pulling, pulling off the robbery.

SPILLMAN: The robbery at; where at?

MULLIS: Mayflower.

SPILLMAN: All right.

MULLIS: Said that, uh, they had somebody on the inside and that, uh, they knew the situation and it was one, two, three, that easy. It were as easy as one, two, three and all I, all I had to do was get in and get out and, uh, said that there was a lady there, and she wasn't gonna give me no problem about giving me the money and, uh, just . . .

SPILLMAN: All right. So you all talked about it and then, uh, who left with you to go do it?

MULLIS: Adam.

SPILLMAN: Adam who?

MULLIS: Smith.

SPILLMAN: All right. You and Adam Smith left; was it Willis's house?

MULLIS: Uh-huh.

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SPILLMAN: And then you all went where?

MULLIS: Over the Al's house.

SPILLMAN: And then what did you do there at Al's house?

MULLIS: Uh, got high, smoked another joint. He rolled us a couple for the road and, uh, said that's for your nerves. You'll need it. Come back [unintelligible], handed me the shotgun, come straight back here when you finished and, uh, I'll count out the money and give everybody their share.

On appeal defendant assigns error to the admission of part of Mullis's 29 January 1987 statement at trial.

Defendant argues that Mullis, in his trial testimony, could not remember whether defendant took part in the discussions concerning robbing the Mayflower Restaurant. Yet, in his 29 January statement Mullis said specifically that defendant, acting in concert with Hemric, persuaded him to commit the robbery. The discrepancy between these two versions of events, defendant contends, prevents the evidence in the prior statement from being admitted to corroborate Mullis's trial testimony.

In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. *State v. Riddle*, 316 N.C. 152, 156-57, 340 S.E. 2d 75, 77-78 (1986); *State v. Higginbottom*, 312 N.C. 760, 768-69, 324 S.E. 2d 834, 840 (1985); *State v. Burns*, 307 N.C. 224, 231, 297 S.E. 2d 384, 388 (1982). See *State v. Ollis*, 318 N.C. 370, 348 S.E. 2d 777 (1986).

State v. Ramey, 318 N.C. 457, 469, 349 S.E. 2d 566, 573 (1986).

Additional or "new" information contained in the witness's prior statement may also be admitted as corroborative if it adds weight or credibility to the witness's trial testimony. *Id.* at 469, 349 S.E. 2d at 573-74.

However, the witness's prior statements as to facts not referred to in his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative

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evidence. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Ramey, 318 N.C. at 469, 349 S.E. 2d at 574 (emphasis supplied and footnote omitted).

Mullis's prior statement that defendant was very active in persuading him to commit the Mayflower robbery adds neither weight nor credibility to his trial testimony that he was unable to remember if defendant even participated in the discussions concerning the robbing of the Mayflower Restaurant. Accordingly, we find the portion of Mullis's prior statement, pertaining to this question, was improperly admitted at trial.

Furthermore, because the evidence in the 29 January 1987 statement is the only evidence clearly identifying defendant as part of the conspiracy, its admission at trial was prejudicial error.

We conclude, therefore, defendant is entitled to a new trial.

Defendant's remaining assignments of error relate to matters unlikely to arise at a second trial and do not warrant discussion here.

New trial.

Judges ARNOLD and GREENE concur.

IN RE: APPEAL OF MEDICAL CENTER (BOWMAN GRAY SCHOOL OF MEDICINE OF WAKE FOREST UNIVERSITY AND NORTH CAROLINA BAPTIST HOSPITALS, INC.) FROM THE DECISION OF THE NORTH CAROLINA STATE BUILDING CODE COUNCIL

No. 8721SC1080

(Filed 2 August 1988)

Statutes § 5.5— State Building Code—height of building measured in feet or stories

An exception of the N. C. State Building Code allowing for a less fire resistant type of construction applied only to business/mercantile buildings of unlimited height but fewer than eight stories, since the number of stories, rather than the height in feet, largely determined the "fire load" of a building

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and thus the necessity for greater fire resistance; therefore, petitioner's request to construct an eleven-story building 187 feet tall in compliance with the less fire resistant requirements of the Code was properly denied.

APPEAL by petitioner from *Cornelius (J. Preston), Judge.* Order entered 12 October 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 March 1988.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Angeline M. Maletto, for respondent-appellee.

GREENE, Judge.

In early 1987, petitioner Medical Center (consisting of Bowman Gray School of Medicine of Wake Forest University and North Carolina Baptist Hospitals, Inc. and hereinafter called "petitioner") submitted plans for a high-rise building to the Engineering Division of the North Carolina Department of Insurance (the "Department"). Petitioner sought to construct a business occupancy facility which would be approximately 187 feet tall with eleven stories and 307,548 square feet of space. Based upon its interpretation of Section 402.2(f) of the North Carolina State Building Code (the "Code"), petitioner proposed to construct its building to comply with the fire resistance requirements of the Code's "Type II" construction. Section 402.2(f) of the Code states:

Business (B) and Mercantile (M) Occupancies of Type II Construction—The *height* of Business (B) and Mercantile (M) Occupancies of Type II construction *shall not be limited* provided the fire-resistance of all columns shall be not less than three (3) hours and the other structural members including floors shall be not less than shown in Chapter VI, but in no case less than two (2) hours except that roofs shall be of not less than one and one-half (1½) hours fire-resistive construction. [Emphasis added.]

The Department informed petitioner that its building could not be designed for Type II construction since Table 400 of the Code required that all such buildings exceeding eighty feet or eight stories be designed for more fire-resistant Type I construc-

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tion. The Department interpreted Section 402.2(f) to allow Type II construction only for business/mercantile buildings of unlimited height *measured in feet*—not measured by stories. Petitioner appealed the Department's position to the Building Code Council (the "Council") pursuant to N.C.G.S. Sec. 143-141 (1987). After the Council unanimously affirmed the Department's interpretation, petitioner appealed the Council's ruling to the Forsyth County Superior Court under Section 143-141(d). The Superior Court found no grounds to reverse or modify the Council's decision under N.C.G.S. Sec. 150B-51 (1987) and therefore affirmed the Council in all respects. Petitioner appeals.

At the outset, we note petitioner's lone exception and assignment of error merely assert the court erroneously affirmed the Council's decision to require petitioner's building be designed for Type I construction. Our review is limited to the exceptions and assignments of errors set forth to the Superior Court's order. See *Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 362 S.E. 2d 294, 296 (1987); N.C.R. App. P. 10(a). The only argument set forth in petitioner's brief is that the Council's interpretation of Section 402.2(f) defies that section's "plain language" and is thus "contrary to law." Cf. N.C.G.S. Sec. 150B-51(b)(4) (1987) (court may reverse or modify agency decision "affected by other error of law"); N.C.R. App. P. 28(a) (questions not discussed in brief are deemed abandoned).

Thus, the sole issue presented for review is whether Section 402.2(f) relaxes Type I construction standards for all business/mercantile buildings—regardless of how the building's height is measured—or whether Section 402.2(f) instead only modifies fire resistance requirements for business/mercantile buildings of eight stories or less. Petitioner's interpretation of Section 402.2(f) and Table 400 of the Code is simple: (1) Section 402.2(f) states the "height" of business occupancy buildings of Type II construction shall not be limited provided the structures meet certain other fire resistance requirements; (2) Table 400 and the definitions of Section 201 of the Code recognize "height" may be measured both in absolute "vertical distance" from the ground as well as by the number of "stories" measured from floor to ceiling; (3) since Section 402.2(f) does not in any way qualify its use of the term "height," a building may exceed both the normal "height-in-feet"

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and "story" limits of Type II business/mercantile buildings so long as its fire construction otherwise complies with the standards of Section 402.2(f). Petitioner accordingly asserts the Superior Court should have simply adopted this alleged "plain meaning" of Section 402.2(f) "without resorting to subtle and forced construction for the purpose of . . . limiting [its] operation." (quoting *Nance v. Southern Rwy.*, 149 N.C. 366, 372, 63 S.E. 116, 118-19 (1908)).

However, the settled rule of construction regarding "plain meaning" is that "words should be given their plain and ordinary meaning unless the context, or history of the statute, requires otherwise." *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E. 2d 37, 42 (1967), cert. denied, 390 U.S. 1028, 20 L.Ed. 2d 285 (1968); see also *In re Medical Center*, 82 N.C. App. 414, 346 S.E. 2d 193 (1985). Given the general purposes of the Code, the specific context of Section 402.2(f) and the special expertise and responsibilities of the Council, we conclude the trial court correctly rejected petitioner's "plain language" construction and affirmed the Council's interpretation that Section 402.2(f) modifies fire resistance requirements only for business/mercantile buildings of eight stories or less.

Section 143-138(c) requires that the Code and its regulations be liberally construed to effect the ends of public health, safety, morals or general welfare. N.C.G.S. Sec. 143-138(c) (1987). The Legislature has specifically imposed on the Council the obligation to prepare, adopt and amend the Code and to interpret its provisions on appeal from enforcement agencies. E.g., N.C.G.S. Sec. 143-138(a), (d) (1987) (authorizing Council to prepare and amend Code); Sec. 143-141(b) (authorizing Council to interpret Code in hearing appeals from enforcement agencies). As the Council itself promulgated the exception on which petitioners rely, the Council's interpretation of that exception must be given due consideration. See *In re Broad and Gales Creek Community Ass'n*, 300 N.C. 267, 275, 266 S.E. 2d 645, 651 (1980).

In its brief, the Council has elaborated the purposes behind its classification of construction as "Type I" and "Type II." Type I construction provides greater protection against fire than does Type II construction. Thus, Type II construction is reserved for buildings which are used by fewer occupants or for fewer purposes and which may accordingly be safely protected with less

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fire-resistant construction. The maximum possible heat generated by a building fire (its "fire load") is a function of the building's height in feet, occupancy use, and number of stories. As the number of stories increases, so does the potential number of occupants and uses and thus the building's fire load increases. Conversely, a design with fewer stories results in a decreased fire load since the decreased square footage created allows fewer occupants or uses—regardless of the building's height in feet. For example, an airport control tower may be quite tall but have only one story and thus reduced occupancy usage. Since its fire load would thus be relatively minimal, it could safely be constructed to comply with Type II standards without diminishing fire protection for the building's occupants or the public.

Petitioner's emphasis on the "plain meaning" of the term "height" despite its context and purpose effectively abolishes more fire-resistant Type I construction for business/mercantile occupancy buildings. We decline to interpret the term "height" in a manner that would result in an exception to a fire resistance standard abolishing the standard itself. By contrast, the Council's interpretation simply allows greater flexibility in commercial building design without sacrificing fire safety: the exception under Section 402.2(f) allowing Type II construction applies only to business/mercantile buildings of unlimited height but fewer than eight stories since the difference in "fire load" produced by such additional height is minimal.

Accordingly, the Superior Court's judgment affirming the Council's interpretation of Section 402.2(f) of the Code is

Affirmed.

Judges BECTON and JOHNSON concur.

Smith v. Quinn

REGINA SMITH v. MARTHA S. QUINN

No. 8729SC946

(Filed 2 August 1988)

Rules of Civil Procedure § 4— alias and pluries summons obtained before previous summons expired—attempt to deliver summons not required

An undelivered summons can serve as a basis for a subsequent alias and pluries summons even though there has been no effort to deliver the original or subsequent summonses to a sheriff; therefore, plaintiff did not violate N.C.G.S. § 1A-1, Rule 4(a) since she obtained an alias and pluries summons each time before the previous summons expired, and the trial court's dismissal of plaintiff's action pursuant to Rule 4(a) was error.

APPEAL by plaintiff from *Gardner (John M.), Judge*. Judgment entered 26 June 1987 in Superior Court, HENDERSON County. Heard in the Court of Appeals 11 February 1988.

Price, Youngblood & Massagee, by Sharon B. Ellis and B. B. Massagee, III, for plaintiff-appellant.

Roberts Stevens & Cogburn, P.A., by Landon Roberts and Glenn S. Gentry, for defendant-appellee.

GREENE, Judge.

This is an appeal from the trial court's dismissal with prejudice of plaintiff's action for personal injuries which she alleges were caused by defendant's negligence.

The facts giving rise to this appeal are undisputed. Plaintiff instituted this action by filing a complaint in District Court on 7 March 1986, approximately one week before the expiration of the applicable three-year statute of limitations. The clerk issued a civil summons on that date; however, the summons was not delivered to the Sheriff for service until 7 April 1986, the day before the summons was to expire. Plaintiff then requested and received a thirty-day extension of time within which to serve the summons. On 7 May 1986 and 1 August 1986, plaintiff requested the issuance of successive alias and pluries summonses. On each occasion, these summonses were issued but plaintiff did not attempt to have them served. Plaintiff's only attempt to serve any of the summonses was when she took the original summons to the Sheriff the day before it was to expire.

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On 28 October 1986, the clerk issued a third alias and pluries summons. This summons was delivered to the Sheriff on 29 October 1986 and served the same day on defendant by delivering a copy of the summons and complaint to her personally at her business address in Hendersonville.

On 4 May 1987, defendant made a motion pursuant to N.C.G.S. Sec. 1A-1, Rule 41(b) (1983) for an involuntary dismissal of plaintiff's action for plaintiff's failure to prosecute and for plaintiff's violation of Rules 4(a) and 11(a). Defendant alleged plaintiff's actions were interposed for delay and plaintiff's complaint should be stricken as sham and false. On 18 May 1987, the trial judge granted defendant's motion and dismissed plaintiff's action with prejudice, concluding that plaintiff had willfully and intentionally violated Rule 4(a) in order to delay the action and gain an unfair advantage over defendant. Plaintiff appeals.

The sole issue before us is whether the trial court erred in dismissing plaintiff's action with prejudice for plaintiff's alleged violation of Rule 4(a).

The trial court found as a fact that defendant had resided in the same location and maintained the same place of business in Hendersonville during the time between when the complaint was originally filed in March and when defendant was finally served in October. The court also found:

11. Plaintiff's counsel, at the hearing, stated in open Court, that suit was filed in order not to be barred by the three-year statute of limitations; that he did not at any time intend to have summons served until such time as he could talk to five or six witnesses [sic]; that he purposely took action to avoid any service of process so the defendant would not be notified of the lawsuit. Plaintiff's attorney stated in open Court that from his past experience dealing with insurance companies he knew that as soon as the Complaint was served on the defendant, the defendant would notify her insurance carrier and the insurance company's lawyer would get in touch with these witnesses who he needed to talk to and stake them out and that thereafter the witnesses would not tell plaintiff's attorney the truth about what occurred.

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In *Smith v. Starnes*, 317 N.C. 613, 346 S.E. 2d 424 (1986), our Supreme Court held that Rule 4 does not require delivery of a summons to the sheriff within thirty days of its issuance in order for the summons to later serve as a basis for the issuance of an alias or pluries summons. The Court based its holding on the provisions of Rule 4(e) which expressly provide the manner in which a summons is discontinued. Since failure to deliver the summons was not a manner of discontinuance set out in Rule 4(e), the Court held that an undelivered summons could serve as a basis for a subsequent alias and pluries summons even though there was no effort to deliver the original or subsequent summonses to a sheriff. Therefore, under the holding in *Starnes*, plaintiff did not violate Rule 4(a) since she obtained an alias and pluries summons each time before the previous summons expired. Accordingly, the trial court's dismissal of plaintiff's action pursuant to Rule 4(a) was error.

Defendant further argues this action should be dismissed because of plaintiff's failure to prosecute under Rule 41(b) and because of plaintiff's violation of Rule 11(a). See *Estrada v. Burnham*, 316 N.C. 318, 341 S.E. 2d 358 (1986). Because the trial court concluded plaintiff violated Rule 4, it did not determine these issues. Dismissal under Rule 41(b) is left to the sound discretion of the trial court. See *Jones v. Stone*, 52 N.C. App. 502, 506, 279 S.E. 2d 13, 15, *disc. rev. denied*, 304 N.C. 195, 285 S.E. 2d 99 (1981). As the trial court did not determine whether plaintiff's actions amounted to a failure to prosecute or whether plaintiff violated Rule 11(a), we may not substitute our discretion for that of the trial court and we will not determine those issues for the first time on appeal. *But see generally C. Wright & A. Miller, Federal Practice and Procedure Sec. 2370 at 212-13 n.17 (1971 & Supp. 1987)* (citing cases dismissing actions for failure to prosecute where diligence not used in serving defendant). For the reasons above, this action is

Reversed and remanded.

Judges WELLS and EAGLES concur.

Palm Beach, Inc. v. Allen

PALM BEACH, INCORPORATED, A CORPORATION, BY AND THROUGH EVAN PICONE, INC., DIVISION OF PALM BEACH COMPANY AND ITS WHOLLY OWNED SUBSIDIARY AUSTIN HILL, LTD., PLAINTIFF v. WILLIAM GARITH ALLEN AND WILLIAM G. TEAGUE, JR., DEFENDANTS

No. 8726DC1191

(Filed 2 August 1988)

Guaranty § 2— guaranty enforceable only by person to whom addressed—parent corporation distinct from subsidiaries

A special guaranty such as the one executed by defendant to plaintiff in this case may only be enforced by the person to whom the guaranty is extended, that is, the person to whom it is addressed; therefore, plaintiff parent corporation could recover on a guaranty executed to it by defendant, but plaintiff division and plaintiff subsidiary could not, since there was no direct mention or reference to them in the guaranty.

APPEAL by plaintiff from *Brown, L. Stanley, Judge*. Judgment entered 29 September 1987 in District Court, MECKLENBURG County. Heard in the Court of Appeals 7 April 1988.

Harkey, Fletcher, Lambeth and Nystrom, by Philip D. Lambeth, for plaintiff-appellant.

Collie and Wood, by James F. Wood, III, for defendant-appellee.

JOHNSON, Judge.

This civil action was instituted to collect sums due on a line of credit extended pursuant to a personal guaranty signed by defendant Teague on 5 August 1985. The first named defendant, William Garith Allen, has been dismissed from this action and is not involved in this appeal in any manner.

On 5 August 1985, defendant Teague signed a personal guaranty to secure payment of an account extended to T. B. Investments of Durham, Inc. by plaintiff, Palm Beach, Inc. Plaintiff, acting through one of its subsidiaries, Austin Hill, Ltd., sold and delivered certain merchandise to T. B. Investments of Durham, Inc., pursuant to the personal guaranty. By its terms, this guaranty was to terminate at midnight on 31 December 1985.

On 8 January 1986, another document entitled, "Amendment to Personal Guarantees" (sic) was executed by defendant Teague

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on behalf of T. B. Investments, Inc., T. B. Investments of Durham, Inc., and T. A. Investments, Inc. in favor of Palm Beach, Inc. only. Although entitled an "amendment," the second document was executed after the first document had expired according to its terms.

Plaintiff issued statements of account to defendant Teague on 11 September 1986 for amounts owing to Evan Picone, Inc. (\$1,447.05) and to Austin Hill, Ltd. (\$2,464.01). The statements of account were not paid in the regular course of business and demand for payment was made upon defendant Teague. When he did not remit payment, plaintiff instituted this action.

Both parties moved for summary judgment pursuant to G.S. 1A-1, Rule 56. At the hearing on the matter, the trial court ruled that the personal guaranty was extended only to Palm Beach, Inc., and not to Evan Picone, Inc. nor to Austin Hill, Ltd., which are separate and distinct legal entities. The court then entered summary judgment for both defendant William G. Teague, Jr. and William Garith Allen, against the plaintiff and dismissed the action with prejudice as to both defendants. From this order plaintiff appeals.

On appeal, plaintiff requests that we consider whether the district court improperly granted defendant Teague's motion for summary judgment against plaintiff. We hold that it did not.

Summary judgment is designed to preclude the need for formal trials where only questions of law exist, by permitting penetration of an unfounded claim and allowing summary disposition for either party when a fatal weakness or absolute defense is revealed. *Hall v. Post*, 85 N.C. App. 610, 355 S.E. 2d 819 (1987). In the case *sub judice*, plaintiff's claim exhibits such a weakness.

The essential facts surrounding the execution of the personal guaranty and its "extension" are basically undisputed. Upon the face of the original guaranty dated 5 August 1985 appears the heading:

PERSONAL GUARANTEE

To: Palm Beach, Inc.

RE: T. B. Investments of Durham, Inc.

The heading of the second guaranty is similar and appears as follows:

Palm Beach, Inc. v. Allen

AMENDMENT TO PERSONAL GUARANTEES (sic)

To: Palm Beach, Inc.

RE: T. B. Investments, Inc.

T. B. Investments of Durham, Inc.

T. A. Investments, Inc.

Neither agreement includes any direct mention or reference to Evan Picone, Inc. nor Austin Hill, Ltd., the division and subsidiary respectively, which plaintiff alleges are covered by the guaranty.

This Court has held that the construction of a guaranty agreement is a matter of law where the language employed is plain and unambiguous. *First Union Nat'l Bank v. King*, 63 N.C. App. 757, 306 S.E. 2d 508 (1983). Although the language employed in the agreement is quite clear, plaintiff-appellant contends that the identification of the parties to the agreement is unascertainable.

In *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966), our Supreme Court held that a parent corporation and its subsidiaries are distinct legal entities and maintain their separate and distinct identities notwithstanding the fact that the parent may own all the stock of the subsidiary. In addition, in *Whitehurst v. FCX Fruit and Vegetable Service*, 224 N.C. 628, 32 S.E. 2d 34 (1944), the Court also held that the fact that one corporation owns all the stock of another corporation standing alone, is not sufficient to render the parent corporation liable on contracts executed by its subsidiary.

Adhering to these principles, we believe that our Supreme Court has established the North Carolina view that a parent corporation and its subsidiaries are to be treated as distinct entities, each liable for its individual contracts executed, and each protected by the procurement of their individual guaranties or letters of credit. In so ruling, we reject plaintiff's contention that a guaranty of payment is to be construed as a general guaranty under all circumstances.

A general guaranty which is addressed to *no specific person*, authorizes anyone to whom it is presented to extend credit upon

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its strength, and is enforceable by anyone who acts upon it, whereas a special guaranty, which is the correct classification of the agreement in the case *sub judice*, may only be enforced by the person to whom the guaranty is extended, that is, the person to whom it is addressed. Annotation, *Who May Enforce Guaranty*, 41 A.L.R. 2d 1213 (1955).

We are convinced that the guaranty agreement in the case at bar was addressed only to, and therefore was extended only to, Palm Beach, Inc., and to no other corporation. Therefore, we affirm the order entered by the trial court.

Affirmed.

Judges BECTON and GREENE concur.

CATHERINE DARRAH HOLDERNESS v. HOWARD HOLDERNESS, JR.

No. 8818DC109

(Filed 2 August 1988)

Divorce and Alimony § 24.9— child support—insufficiency of findings

The trial court erred in modifying child support provisions of a separation agreement where the court made no findings as to the reasonable expenses of the parties and no specific findings with respect to the actual past or present expenses incurred for the support of the children; therefore, there was no basis for a determination as to the parties' relative abilities to provide child support and as to the amount required for the reasonable needs of the children to be met.

APPEAL by defendant from *Lowe (W. Edmund), Judge*. Order entered 12 November 1987 in District Court, GUILFORD County. Heard in the Court of Appeals 7 June 1988.

Plaintiff and defendant were married to each other in 1977 and separated in December 1985. They have three minor children. According to the terms of a separation agreement executed by the parties at the time of their separation, joint custody was stipulated and defendant agreed to pay \$1,800.00 per month child support. Defendant also agreed to provide health insurance for the children and take responsibility for all extraordinary unin-

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sured medical and dental expenses. The parties were divorced on 12 December 1986.

Plaintiff initiated this action for child support and custody on 13 August 1986. The complaint sought among other things an increase in child support over the amount set forth in the separation agreement. Plaintiff's claim for child support was heard on 22 October 1987. The trial court did not hear evidence but entered its order based on affidavits of income and expenses filed by the parties.

During an in-chambers meeting with counsel for the parties, the trial judge commented that some of the expenses for the children, specifically child care expenses and the proportion of fixed household expenses attributed to the children, appeared to be high. There was no discussion or inquiry by the court regarding plaintiff's listed personal expenses. Other than an inquiry as to the colleges attended by defendant's children from a previous marriage, the court did not question defendant's listed expenses.

On 12 November 1987 an order was entered requiring defendant to pay (1) \$2,800.00 per month to plaintiff for child support, an increase of \$1,000.00 per month over the amount in the parties' agreement and (2) \$1,000.00 in attorney's fees to plaintiff's attorney. Defendant appeals.

Luke Wright for plaintiff-appellee.

Smith, Helms, Mulliss & Moore, by Ramona J. Cunningham and Jeri L. Whitfield, for defendant-appellant.

SMITH, Judge.

Defendant brings forward several assignments of error and puts forth as his primary argument the trial court's failure to make adequate findings of fact and conclusions of law. He contends that the court's findings of fact are inadequate to support its conclusions as to the amount reasonably required for the support of the children, defendant's ability to pay that amount and plaintiff's ability to contribute to such support. We agree.

In an action to modify child support provisions of a separation agreement which has not previously been incorporated into an order of judgment of the court, the court is called upon, for the

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first time, to make a determination that the reasonable needs of the children are provided for in accordance with the abilities of those responsible for the children's support. *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E. 2d 581 (1986). "[T]he moving party's only burden is to show the amount of support necessary to meet the reasonable needs of the child[ren] at the time of the hearing." *Id.* at 76, 343 S.E. 2d at 585.

To comply with G.S. 50-13.4(c), the trial court is required to make findings of fact with respect to the factors listed in the statute. *Boyd v. Boyd, supra*; *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985). "It is not enough that there may be evidence in the record sufficient to support findings which could have been made." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). The trial court must make findings of fact on the parties' incomes, estates and present reasonable expenses in order to determine their relative ability to pay. *Newman v. Newman*, 64 N.C. App. 125, 306 S.E. 2d 540, *disc. rev. denied*, 309 N.C. 822, 310 S.E. 2d 351 (1983). Such findings are required for the appellate court to determine whether the trial court gave "due regard" to the factors listed. *Boyd v. Boyd, supra*. See *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E. 2d 47 (1985).

The record in the present case contains evidence with respect to the income and estates of each of the parties. Notwithstanding this evidence, the trial court made no findings as to their reasonable expenses. Without findings relating to parties' reasonable expenses, there is no basis for a determination as to the parties' relative abilities to provide the support necessary to meet the reasonable needs of the children. *Boyd v. Boyd, supra*. The order in this case fails to meet these requirements.

The trial court's order is also deficient in its findings of fact regarding the children's reasonable needs. In plaintiff's affidavit, the itemized expenses for the children totalled \$3,897.06 per month. In reviewing these expenses, the trial judge indicates in his order without making a specific finding that child care expenses and the proportion of fixed household expenses attributed to the children appeared to be high. However, he found the monthly needs of the children to be the exact amount set forth in plaintiff's affidavit, \$3,897.06. This finding was made notwithstanding the fact that the order recites that plaintiff's counsel ad-

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mitted that \$600.00 miscellaneous expenses no longer existed. "In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses." *Atwell v. Atwell*, 74 N.C. App. at 236, 328 S.E. 2d at 50. The order contains no specific findings with respect to the actual past or present expenses incurred for the support of these children and is, therefore, insufficient to support the court's conclusion that the reasonable needs of the children amounted to \$2,800.00 per month. Having held the order deficient, there is no need to address defendant's other assignments of error.

For the foregoing reasons, this case is remanded for findings of fact and conclusions of law in accordance with this opinion.

Vacated and remanded.

Judges EAGLES and ORR concur.

ANGELA JOANNE NANCE, PLAINTIFF v. ROBIN DALE ROBERTSON,
AMERICAN TELEVISION AND COMMUNICATIONS CORPORATION,
DEFENDANTS

No. 878SC1213

(Filed 2 August 1988)

Automobiles § 58.1; Damages § 11.2— turning in front of oncoming vehicle— sudden emergency—no willful or wanton act

Defendant's turning of his van in front of plaintiff's approaching car was not a willful or wanton act which would allow for the imposition of punitive damages, since defendant made the turn in an effort to avoid a collision with a truck which was about to skid into the back of defendant's van.

APPEAL by plaintiff from *Llewellyn, Judge*. Order entered 27 July 1987 in Superior Court, WAYNE County. Heard in the Court of Appeals 3 May 1988.

George K. Freeman, Jr. for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Richard T. Boyette and Samuel H. Poole, Jr., for defendant appellees.

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PHILLIPS, Judge.

Plaintiff, injured when her Volkswagen car collided with the corporate defendant's Ford Econoline van driven by the defendant Robertson, sued for both compensatory and punitive damages, alleging that the collision occurred because Robertson intentionally, willfully and wantonly turned the van in front of her approaching vehicle. The punitive damages claim was dismissed by an order of partial summary judgment which is appealable, though interlocutory, since the two claims depend upon the same evidence and plaintiff's right to try them before the same jury and avoid the possible travesty of different juries rendering conflicting verdicts is a substantial one. G.S. 1-277 and G.S. 7A-27; *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976). In entering the order the court considered depositions and other materials which indicate the following:

The collision occurred on U. S. Highway 70 near Burlington in Alamance County at high noon on a drizzly day. Plaintiff in her Volkswagen was traveling in an easterly direction, the van was traveling in the opposite direction, and the highway at that place had two lanes. Defendant Robertson, driving his employer's van loaded with television and communications equipment worth approximately \$60,000, was on his way to his parents' home on the south side of the highway. The highway shoulder at that place is about three or four yards wide and is bordered by a shallow ditch about a foot and a half deep, which the entrance to the Robertson driveway crosses. When his parents' house came into Robertson's view he signaled for a left turn, slowed the van down, and seeing plaintiff's approaching car between 300 and 400 yards away, stopped opposite the driveway entrance. Shortly thereafter in the rearview mirror Robertson saw a mid-sized truck skidding toward the van. Thinking that he could avoid a collision by turning the van into the driveway before either the truck or plaintiff's car got there he suddenly turned the van toward the driveway but partially overshot it and when he stopped the van its right front tire was at the edge of the ditch, its left front tire was in the driveway, and the back wheels of the van were still on the highway. Plaintiff's car, about 50 feet away when the van started its turn and traveling about 35 to 40 M.P.H., crashed into the van's right rear wheel and quarter panel. The skidding truck still in its lane,

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though veering to the right, passed on without contacting either vehicle.

The evidence and plaintiff's appeal give rise to the following principles of law: The purpose of punitive damages is to punish wrongdoers for misconduct of an aggravated, extreme, outrageous, or malicious character. Punitive damages for accidental injuries can be awarded only where the defendant's misconduct reaches a higher level than mere negligence, *Holley v. Hercules, Inc.*, 86 N.C. App. 624, 627, 359 S.E. 2d 47, 49 (1987), and amounts to wantonness, willfulness, or a reckless indifference to consequences. *Ingle v. Allen*, 69 N.C. App. 192, 317 S.E. 2d 1, *disc. rev. denied*, 311 N.C. 757, 321 S.E. 2d 135 (1984). "An act is wanton when, being needless, it manifests no rightful purpose," *Wise v. Hollowell*, 205 N.C. 286, 289, 171 S.E. 82, 84 (1933), and a willful injury requires "actual knowledge . . . of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury." *Wagoner v. North Carolina Railroad Company*, 238 N.C. 162, 168, 77 S.E. 2d 701, 706 (1953). "[T]he word 'wanton' implies turpitude, and that the act is committed or omitted of willful, wicked purpose; that the term 'willfully' implies that the act is done knowingly and of stubborn purpose, but not of malice." *Ibid.* at 167, 77 S.E. 2d at 705. Since the law grades human conduct according to the circumstances that give rise to it, one endangered by a sudden emergency not of his own making is not expected to act with the same rectitude as one not so endangered. *Rodgers v. Carter*, 266 N.C. 564, 146 S.E. 2d 806 (1966).

Measured by the foregoing principles of law the evidence in this case, viewed in its most favorable light for the plaintiff, does not tend to show any aggravated misconduct by Robertson that merits the imposition of punitive damages. The evidence tends only to show that before the emergency of the skidding truck developed Robertson's van was lawfully stopped on the highway, posing no danger to anyone; that in spontaneously seeking to avoid the skidding truck Robertson turned the van across the path of plaintiff's rapidly approaching car in an effort to reach the driveway to his parents' home when that movement could not be safely made and the safer course would have been to drive straight ahead; and that the purpose of his action, to avoid a collision, is not one that the law condemns. The evidence does not show, however, that an entirely risk free course was available to

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him as the van could have been hit by the skidding truck and knocked on down the road or into plaintiff's car if it had either stayed where it was or had been started forward; nor does it show that the course Robertson took was clearly doomed to fail, and thus utterly without basis, because the effort to avoid a collision failed just by the width of the van's rear tire and might have succeeded had he not overshot the driveway. Thus, the record discloses no basis for plaintiff's characterization of Robertson's spur of the moment course as either wanton, willful, or recklessly irresponsible, and the argument to the contrary based upon Robertson's admission that he *intentionally* turned the van in front of her approaching car, is overdrawn. Because not every intentional act is a wanton or willful act, as the foregoing authorities indicate; indeed, though the vast majority of motor vehicular collisions result from intentional turns or acts of one kind or another, only a small percentage of such acts exceed the level of ordinary negligence. In all events we hold that under our law an imprudent or even reckless act intentionally done in an effort to avoid imminent danger is not a willful or wanton act, though the same act intentionally done for no proper purpose is.

Affirmed.

Judges JOHNSON and SMITH concur.

STATE OF NORTH CAROLINA v. FERNANDO SCOTT JACKSON

No. 873SC609

(Filed 2 August 1988)

1. Criminal Law §§ 138.16, 138.29— aggravating factors— killing premeditated— inducement of another to participate

Evidence was sufficient to support the trial court's finding as a non-statutory factor in aggravation that a second degree murder had been planned for two months and was premeditated, and the same evidence was not used as a basis for the finding that defendant induced another to conspire with him in the murder, where there was evidence that defendant hired the third person to kill the victim and then later instructed him not to; defendant told others of his plan to kill the victim before he got in touch with the third person; and the autopsy showed that the killing was by strangulation, which required persistent effort over a period of several minutes.

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2. Criminal Law § 138.6— sentence—no consideration given to victim's relatives' thoughts on sentence

Receiving the thoughts of a victim's relatives as to the sentence which should be entered, though harmless in this case, is a practice which is not encouraged. N.C.G.S. § 15A-825(9).

3. Criminal Law § 138.6— sentence—victim impact statements—procedure for receiving

There was no merit to defendant's contention that victim impact statements should not be received unless preceded by live testimony.

APPEAL by defendant from *Reid, Judge*. Judgment entered 28 January 1987 in Superior Court, PITT County. Heard in the Court of Appeals 8 December 1987.

Attorney General Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for the State.

Appellate Defender Hunter, by Assistant Appellate Defender Geoffrey C. Mangum, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant pled guilty to the second degree murder of Lois Tyson and was sentenced to a prison term of forty years. The sentence greatly exceeds the presumptive term and he contends that in arriving at it the court committed two errors, one of which was finding as a non-statutory factor in aggravation that the killing had been planned for two months and was premeditated. The finding, so he argues, is not supported by evidence or if it is it is the same evidence upon which another aggravating factor is based—that defendant induced Jerry Wayne Martin to conspire with him to murder Tyson. Neither prong of the argument has merit. Apart from the evidence that defendant hired Jerry Wayne Martin to kill Tyson and then later instructed him not to, there was evidence that he told others of his plan to kill Tyson before he got in touch with Jerry Wayne Martin, and the autopsy shows that the killing was by strangulation, which requires persistent effort over a period of several minutes.

[2, 3] The court's other error, so defendant maintains, was in receiving the out-of-court statements of the victim's two sisters. The statements were on Victim Impact Statement forms supplied to them by the Pitt County Sheriff's Department and on them each sister described the sadness and shock she experienced

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because of the killing, and in response to a directive on the form to indicate her thoughts "about the sentence that the Court should impose" stated in effect that the maximum sentence should be given. In addition one sister, in the space provided for describing the effect that the crime had had on her, reported a conversation she had with defendant concerning the killing and expressed her beliefs that defendant acted in cold blood, was not sorry for his crime, and would have killed the victim's five-year-old son also if he had been there. The judge struck these latter comments from that sister's statement and stated that he was disabusing his mind of their content. Even if receiving and considering the rest of the two statements was error it could not have prejudiced defendant in our opinion. For the court certainly knew before then, as every reasonably knowledgeable person knows, that almost invariably relatives and friends of murder victims are shocked and saddened by their killing and are of the opinion that murderers should be severely punished. Nevertheless, receiving the thoughts of relatives as to the sentence that should be entered, though harmless in this instance, is a practice not to be encouraged. The only authority for the court considering victim impact statements is G.S. 15A-825(9), which directs law enforcement agencies in facilitating the convenience of victims and witnesses in criminal cases to "make a reasonable effort to assure that each victim and witness within their jurisdiction: . . . [h]as a victim impact statement prepared for consideration by the court." Obviously, what a victim or a witness thinks the evidence in a case shows or what the defendant's punishment should be is not an effect of crime but advocacy, and such thoughts have no place in a proper impact statement. Defendant's argument that impact statements should not be received unless preceded by live testimony is rejected. One reason, no doubt, in authorizing impact statements to start with was to save the time of the court and requiring a witness to testify as to what has already been concisely written out would be pointless. Which is not to say, of course, that the makers of such statements should not be in court and available for cross-examination; we think that ordinarily they should be and in this instance defendant has not shown either that they were not in court or that he desired to cross-examine them. The record does show, however, that one sister testified about other matters and that defendant's general objections were merely to the receipt of the statements and that nothing was said

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about him desiring to cross-examine the makers and them not being available.

Affirmed.

Judges WELLS and PARKER concur in the result.

STATE OF NORTH CAROLINA v. JOHN JASPER GREEN, JR.

No. 8710SC1229

(Filed 2 August 1988)

Narcotics § 4—conspiracy to traffic in cocaine—conspirator acquitted—defendant not guilty of conspiracy

Defendant could not be found guilty of conspiracy to traffic in cocaine where his alleged co-conspirator had been acquitted by another jury.

APPEAL by defendant from *Farmer, Judge*. Judgment entered 24 July 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 3 May 1988.

Attorney General Thornburg, by Associate Attorney General Robin W. Smith, for the State.

John T. Hall for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of conspiring with Claude Enoch and/or Randolph Fryar to traffic in more than 400 grams of cocaine in violation of G.S. 90-95. The trials of the three alleged conspirators were severed and Enoch had been tried and acquitted when defendant was tried. Nevertheless, in defendant's trial the court received into evidence out of court statements made by Enoch, refused to receive evidence of Enoch's prior acquittal, and charged the jury that it should find defendant guilty of the conspiracy if they found that he agreed with either Claude Enoch or Randolph Fryar to traffic in more than 400 grams of cocaine as charged in the indictment. These grave errors require a new trial and defendant's other contentions need not be discussed.

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Inasmuch as a criminal conspiracy requires the agreement of two or more conspirators to the same criminal scheme it is inherent, as our Supreme Court held in *State v. Tom*, 13 N.C. (2 Devereaux) 569 (1830), that one cannot conspire with a non-conspirator. In that case, quite similar to this one, the defendant's conspiracy conviction was set aside because the trial judge instructed the jury that they could convict him if they found that he had conspired with an alleged co-conspirator who had been acquitted by another jury. In this case, since it had been determined that Claude Enoch was not a conspirator in the conspiracy defendant was being tried for, defendant's trial should have been conducted on that judicially established premise, rather than upon the foundationless and fictitious theory that Enoch was such a conspirator. We vacate defendant's conviction and remand the case to the Superior Court for a retrial consistent with this opinion.

Vacated and remanded.

Judges JOHNSON and SMITH concur.

EDWYN A. TIRYAKIAN v. KAREN E. TIRYAKIAN

No. 8814DC129

(Filed 16 August 1988)

1. Husband and Wife § 2.1— antenuptial agreement—failure to disclose financial status—grounds for invalidation

Absent any voluntary waiver, especially considering the confidential relationship between prospective spouses, the failure fully to disclose one's financial status is grounds for invalidating an antenuptial agreement.

2. Trusts § 13.3— purchase of condominium by husband—funds supplied by wife—resulting trust established

The trial court properly established a resulting trust in defendant wife's favor where plaintiff's grandmother gave defendant a check for \$10,000 in her maiden name which she deposited into a separate account in her own name; she subsequently wrote a check for \$10,000 to plaintiff and made a notation on it, "For the condo"; plaintiff used the funds to purchase a condominium in his own name which the parties used as their marital home; whether the grandmother intended her gift to benefit only the plaintiff was irrelevant;

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defendant's intentions in providing the \$10,000 toward the real estate purchase were determinative; and defendant's notation on the check and her trial testimony that she always thought she had an interest in the condominium were sufficient evidence of her intention to support the establishment of a resulting trust.

3. Divorce and Alimony § 30— equitable distribution—determination as to marital or separate property—property purchased in anticipation of marriage—no donative intent

In an equitable distribution proceeding where a determination must be made as to what is separate and what is marital property, the sole fact that property has been purchased in anticipation of marriage is not, in and of itself, sufficient to establish donative intent; therefore, the trial court erred in finding that certain household furnishings were marital property where they were purchased before marriage with money provided by plaintiff's grandmother.

4. Divorce and Alimony § 30— equitable distribution—part of purchase price of automobile—separate property

In an equitable distribution proceeding \$10,000 worth of a BMW automobile purchase price (subject to depreciation) should be denominated plaintiff husband's separate property where plaintiff's grandmother gave him \$10,000 which he deposited in the parties' joint bank account and later used to pay off the loan on the car.

5. Divorce and Alimony § 30— equitable distribution—purchase of car before marriage—separate property

Where plaintiff husband, two months before his marriage to defendant, paid \$7,000 as a down payment on a car, the car was titled in both parties' names, and the parties shared the payments equally until one month after the marriage when the wife took them over and continued to pay them after the date of separation, the trial court erred in determining that the husband intended to make a gift to the wife of a half interest in the car and that the car was entirely marital property; rather, the car should be apportioned among the marital estate, the husband's separate estate, and the wife's separate estate. N.C.G.S. § 50-20(b)(2).

APPEAL by plaintiff from *David Q. LaBarre, Judge*. Judgment entered 22 October 1987 in District Court, DURHAM County. Heard in the Court of Appeals 8 June 1988.

Maxwell, Martin, Freeman, and Beason, P.A., by John C. Martin and Robert A. Beason, for plaintiff-appellant.

R. Roy Mitchell, Jr. for defendant-appellee.

BECTON, Judge.

Plaintiff, Edwyn A. Tiryakian, hereinafter the husband, brought this action seeking an absolute divorce. Defendant, Karen E. Tiryakian, hereinafter the wife, filed an "Answer and Cross

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Action" seeking, among other things, equitable distribution pursuant to N.C. Gen. Stat. Sec. 15-20. An absolute divorce, based on a one-year separation, was entered on 10 February 1987, and a hearing upon the wife's claim for equitable distribution was held in August 1987. Following that hearing, the trial court entered an order which, among other things: (1) voided an antenuptial agreement signed by the wife on the afternoon before the wedding, (2) created a resulting trust in favor of the wife in the amount of \$10,000, and (3) designated as marital certain personal property acquired prior to and during the course of the marriage. The husband appeals. We affirm the trial court's ruling regarding the antenuptial agreement and the resulting trust. We reverse and remand for further findings of fact regarding the designation as marital of certain items of personal property.

I

Husband and wife were married on 15 September 1984. During the marriage, the husband was employed as a securities analyst with a brokerage firm in Durham where he earned \$15,000 per year. He also received an annual gift of \$10,000 from his grandmother. The wife is a high school graduate who worked as a travel agent during the course of the marriage. Her annual income was approximately \$13,000.

Two months prior to their wedding, the husband's grandmother, Mrs. Keghinee Tiryakian, expressed an interest in providing the couple with a marital home. The parties selected a condominium in Durham priced at \$72,000. In order to pay for the property, the grandmother gave several checks to different people. She gave one check for \$10,000 to the wife in her maiden name, Karen E. Whitfield, and a second one for \$10,000 to the husband's mother. She gave three more checks to the husband, altogether totaling \$60,000. None of the checks contained any notations.

On 11 July 1984, the wife wrote the husband a check for \$10,000 which contained the notation "for the condo." Six days later, the husband purchased the condominium which was deeded solely in his name. The wife was not present at the closing. The parties used the remaining funds to purchase household furniture and appliances.

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During July of that same year, the parties also purchased a 1984 Datsun Maxima for \$12,000. The husband used \$7,000 of his own funds for the down payment, and the parties agreed to make equal contributions towards the finance payments. The car was titled in both names. In October of 1984, the wife took over the car payments and continued to make them after the date of separation.

On 14 September 1984, one day before their wedding, the husband called the wife and asked her to meet him at his attorney's office to execute a legal document. The wife met the husband in the parking lot, and he gave her an antenuptial agreement with several copies. There is conflicting evidence as to what was disclosed at this point. The husband testified that he and the wife had discussed the terms of the agreement earlier and the wife was well aware of its contents. The wife testified that, although the husband had once raised the issue of an antenuptial agreement, they had not discussed any specifics and she had expressed no interest in entering into one. She also testified that on the day in question, the husband told her, and she believed, that the document was to protect his interest in his grandmother's estate.

The wife never read the agreement, nor did she consult with an attorney about its contents. Instead, she rushed to her bank, had her signature notarized, and returned the documents within forty minutes. That evening, as the couple left their rehearsal dinner, the husband presented the wife with one of the copies which she had failed to sign. No further disclosures were made, the wife did not attempt to read the document; and she signed it immediately. The parties were married the next day.

During their marriage, the parties purchased a 1985 BMW 318i and other household items. At the time of separation, their joint checking and savings accounts had a balance of approximately \$700.

II

The husband appeals, arguing that the trial court erred by: (1) voiding the antenuptial agreement because the evidence showed that the wife signed it voluntarily and had knowledge of its contents and the husband's financial status; (2) creating a re-

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sulting trust in favor of the wife because the check from the grandmother to the wife was intended to benefit the husband; and (3) classifying as marital certain items of personal property purchased prior to and during the marriage because they were separate property acquired by the husband without donative intent to the wife.

III

[1] The husband first argues that the trial court erred in ruling the antenuptial agreement void and unenforceable because the wife chose not to review the document and signed it voluntarily after the husband had disclosed its contents and his own financial status. Before addressing the sufficiency of the evidence supporting the ruling, we review the standards which govern the enforceability of such agreements.

North Carolina has recently enacted the Uniform Premarital Agreement Act, N.C. Gen. Stat. Chapter 52B. However, the contract at bar predates the effective date of that legislation. The relevant statutes allow persons about to be married to release their rights, as acquired by marriage, to the property of the other spouse, N.C. Gen. Stat. Sec. 52-10(a), and to provide for the distribution of marital property by written agreement, N.C. Gen. Stat. Sec. 50-20(d). Moreover, prior to the aforementioned statutes, our Courts held that premarital agreements were not against public policy. *Turner v. Turner*, 242 N.C. 533, 89 S.E. 2d 245 (1955).

Our research, however, reveals a scarcity of North Carolina case law specifically addressing the enforceability of an antenuptial agreement based on the circumstances surrounding its execution. It has been established that "[a] confidential relationship . . . exists between a couple contemplating marriage." *Sheppard v. Sheppard*, 57 N.C. App. 680, 682, 292 S.E. 2d 169, 170 (1982). In his treatise, *North Carolina Family Law*, Lee explains that persons about to marry "are not dealing at arm's length with each other. The usual consequences of a confidential relationship are present." 2 R. E. Lee, *North Carolina Family Law*, Sec. 181 at 432 (1980). Lee also quotes extensively from an article by Professor Horner Clark which recognizes an affirmative duty on the part of each prospective spouse to fully disclose his or her financial status. *Id.* at 433, quoting from Clark, "Antenuptial Contracts," 50

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U. Colo. L. Rev. 141, 143-46 (1979). The article goes on to state that “[a] court’s disapproval of [an] antenuptial agreement may also be influenced by the fact that it was drawn by the husband’s lawyer and not thoroughly explained to the wife, or by the fact that she was not advised by counsel of her own.” *Id.*

Similar provisions regarding the disclosure of financial status are echoed in North Carolina’s newly adopted Uniform Premarital Agreement Act. The official comment directs us to other state statutes which determine enforceability based on full disclosure. See Ark. Stat. Sec. 55-309; Minn. Stat. Ann. Sec. 519.11.

In this case, the trial court found that the husband failed to make a full disclosure of his financial status, and that the wife was presented with an agreement drawn by the husband’s attorney which she signed without knowledge of its contents and without seeking independent legal advice. The husband argues that there was no evidence that he failed to provide a fair and reasonable disclosure of his property. We disagree. In a non-jury trial, the court’s findings of fact and conclusions of law are conclusive on appeal, so long as they are supported by competent evidence. *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E. 2d 160, 165 (1979). The trial court’s findings of fact are supported by the wife’s testimony that the husband failed to disclose either his financial status or the contents of the agreement. We therefore uphold the court’s decision to void the antenuptial agreement. Considering the applicable statutory and case law, we hold that, absent any voluntary waiver, especially considering the confidential relationship between prospective spouses, the failure to fully disclose one’s financial status is grounds for invalidating an antenuptial agreement.

IV

[2] The husband further argues that, because the money given to the wife by the husband’s grandmother prior to the marriage was meant to benefit the husband, the trial court erred in establishing a \$10,000 resulting trust in the wife’s favor. The argument is without merit.

It is well established that when one person provides purchase money to pay for real property and the title is taken in the name of another, “a resulting trust commensurate with his in-

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terest arises in favor of the one furnishing the consideration." *Mims v. Mims*, 305 N.C. 41, 46, 286 S.E. 2d 779, 784 (1982). Such a trust is not dependent upon any agreement between the parties. *Id.*; *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 86 (1938). Rather, it functions to effectuate the intention, at the time of transfer, of the party furnishing the purchase money and "such intention is to be determined from all the attendant facts and circumstances." *Mims* at 57, 286 S.E. 2d at 790; *Waddell v. Carson*, 245 N.C. 669, 674, 97 S.E. 2d 222, 226 (1957).

The husband argues, in essence, that his grandmother's intention was to give him a condominium; therefore the wife served only as a conduit for a portion of the purchase money and can claim no interest. The argument misses the point. The evidence shows that a \$10,000 check was delivered into the wife's hands, that it was made out to her maiden name, that she deposited it in her separate bank account before marriage, and that the husband testified that the funds were the wife's to do with as she pleased. In much the same way, \$60,000 was delivered to the husband. He argues elsewhere, and we agree, that this money was a gift to him. By the same logic, the \$10,000 must have been a gift to the wife. Thus, the grandmother's intentions are irrelevant. The critical issue becomes the wife's intentions in providing \$10,000 toward the real estate purchase, which were evidenced by the notation on her check to the husband and by her testimony at trial that she always thought she had an interest in the condominium.

The trial court stated that, at the time the wife wrote the \$10,000 draft, she assumed she would have an interest in the condominium. We find no reason to overturn the trial court's finding. A resulting trust was properly established.

V

The husband assigns error to the equal distribution of certain personal property acquired before and during the marriage. However, the husband offers no reasons why the distribution of marital property should have been other than equal. Rather, he seems to argue that certain items of property were erroneously designated marital rather than separate. We find merit in some of these exceptions.

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In applying this State's equitable distribution statute, N.C. Gen. Stat. Sec. 50-20, the trial court must identify with specificity the property owned by the parties, classify it as marital or separate, and then divide the marital property equally or according to equitable factors. *Nix v. Nix*, 80 N.C. App. 110, 113, 341 S.E. 2d 116, 118 (1986). The statute defines marital property as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation." N.C. Gen. Stat. Sec. 50-20(b)(1). Separate property refers to property "acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent or gift during the course of the marriage." N.C. Gen. Stat. Sec. 50-20(b)(2).

This Court has interpreted the term "acquired" as having a dynamic meaning, thus adopting the source of funds theory which recognizes that because property is acquired over time, it may have a dual nature and must therefore be designated according to "whether the funds used for acquisition were marital or separate." *Mauser v. Mauser*, 75 N.C. App. 115, 118, 330 S.E. 2d 63, 66 (1985); *accord Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1985).

[3] The husband lists six items of property he argues were purchased with his separate funds and thus should not have been classified as marital. The trial court found that a dining room suite, a washer, a dryer, and a refrigerator were purchased prior to and in contemplation of marriage and were therefore marital. This conclusion cannot be supported by competent evidence. Instead, the evidence shows that the items were purchased with the remainder of the money provided by the grandmother. Because neither party argues that the money was anything other than a gift and because the wife has already been credited with her \$10,000 resulting trust, the remaining funds must be the husband's separate property. The sole fact that the property was purchased in anticipation of marriage is not, in and of itself, sufficient to establish donative intent.

[4] The husband also argues that a 1985 BMW 318i should be denominated as separate property because his grandmother gave him \$10,000 which he used to pay off the automobile loan. The evidence shows that the car was purchased during the marriage for \$17,500, that the parties paid \$5,000 of marital funds as a

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down payment, and that they proceeded to pay off the remainder of the financing. The trial court found that soon thereafter the husband received a \$10,000 draft from his grandmother which he deposited in the couple's joint bank account and later used to pay off the loan. The court concluded that the husband deposited the check "intending the same to be a contribution to marital funds." The mere act of depositing separate funds in a joint account does not deprive them of their separate property status. *Loeb v. Loeb*, 72 N.C. App. 205, 212, 324 S.E. 2d 33, 39, cert. denied, 313 N.C. 508, 329 S.E. 2d 393 (1985); *Meyers v. Meyers*, 68 N.C. App. 177, 180-181, 314 S.E. 2d 809, 812 (1984). Absent the deposit, the record shows no evidence of the husband's donative intent. Therefore, \$10,000 of the BMW purchase price should be considered the husband's separate property. This amount will be subject to the same rate of depreciation as the car itself.

[5] The husband also argues that a 1984 Datsun should not have been included as marital property. We find some merit in this argument. The trial court found that two months prior to the marriage, the husband paid \$7,000 as a down payment, that the car was titled in both parties' names, and that the parties shared equally the payments until some time in October of 1984 when the wife took them over and continued to pay them after the date of separation. The trial court concluded that "by making the down payment and placing the automobile in joint names, the [husband] intended that a gift be made to the wife of one-half interest in the automobile." We disagree.

Again we return to the source of funds theory to determine which estate is entitled to the property. The \$7,000 down payment was clearly the husband's separate property. The equitable distribution statute states that, regardless of title, "property acquired in exchange for separate property shall remain separate . . . unless a contrary intent is expressly stated in the conveyance." N.C. Gen. Stat. Sec. 50-20(b)(2). Thus, the trial court's conclusion of donative intent cannot be supported by its findings of fact. Furthermore, it appears that both parties made payments out of separate funds prior to the marriage and that the wife continued to make payments out of separate funds after the date of separation. The trial court made no findings and the transcript reveals no evidence indicating the number or amount of these payments. For the above stated reasons, we remand for further

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findings of fact with instructions that each estate (husband's separate, wife's separate, and marital) be apportioned its pro rata share.

VI

Finally, the wife seeks, through a cross-assignment of error, to overturn the trial court's holding that the condominium was the husband's separate property, arguing that it should have been denominated as marital and thus subject to equitable distribution. This argument, which purports to show that the judgment was erroneously entered, can only be raised by appeal. *St. Clair v. Rakestraw*, 67 N.C. App. 602, 607, 313 S.E. 2d 228, 232, *rev'd in part on other grounds*, 313 N.C. 171, 326 S.E. 2d 19 (1984). Because the wife did not appeal from the judgment, this cross-assignment of error is not properly before this Court and is therefore dismissed.

In summary, we uphold the trial court's voiding of the antenuptial agreement and the establishment of a \$10,000 resulting trust in favor of the wife. We remand with instructions that the dining room suite, the washer, the dryer, the refrigerator, and \$10,000 worth of the BMW purchase price (subject to depreciation) be denominated the husband's separate property and that further findings of fact be made regarding the source of all funds used to purchase the 1984 Datsun Maxima.

Affirmed in part, reversed in part, and remanded.

Judges WELLS and PHILLIPS concur.

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IN RE THE MATTER OF THE TRUST CREATED UNDER ITEM THREE OF THE WILLS OF HERBERT JACOBS AND BELLA LEWAN JACOBS AND JAMES F. FREER, AS GUARDIAN AD LITEM OF CHRISTINA KATHLEEN PAFFERO, A MINOR v. MILTON WEINSTEIN, IN HIS CAPACITY AS TRUSTEE FOR THE TRUST ESTABLISHED UNDER ITEM THREE OF THE WILLS OF HERBERT JACOBS AND BELLA LEWAN JACOBS, ALAN MARSHALL JACOBS, SONIA JACOBS LINDER, ERIC STEWART LINDER, NICOLE JACOBS, A MINOR, DANIEL JACOBS, A MINOR, THE UNBORN ISSUE OF ALL PERSONS SET FORTH ABOVE, THE UNKNOWN HEIRS OF HERBERT JACOBS AND BELLA LEWAN JACOBS, ALL OTHER INTERESTED PERSONS WHETHER KNOWN OR UNKNOWN, BORN OR UNBORN, WHO HAVE OR MAY HAVE ANY RIGHTS TO OR INTEREST IN THE ASSETS OF THE TRUST CREATED UNDER ITEM THREE OF THE WILLS OF HERBERT JACOBS AND BELLA LEWAN JACOBS

No. 8826SC72

(Filed 16 August 1988)

1. Clerks of Court § 4; Trusts § 2.2— removal of trustee—defenses of laches, estoppel, and unclean hands raised—transfer from clerk to civil issue docket proper

Where a guardian ad litem of a minor trust beneficiary filed petitions with the clerk of superior court to have defendant removed as trustee, and defendant answered claiming defenses of laches, estoppel, and unclean hands, the clerk properly transferred the action to the civil issue docket, since plaintiff alleged breach of fiduciary duties and that was a civil matter "arising from" the administration of the estates in question rather than "a part of" the administration of the estates over which the clerk would have had exclusive original jurisdiction.

2. Trusts § 2.2— removal of trustee—personal interests in conflict with beneficiaries' interests—excessive commissions

Evidence was sufficient for the jury to conclude that defendant trustee's personal interests were in direct conflict with the trust beneficiaries' interests so that breach of loyalty could be found where the evidence tended to show that defendant petitioned the clerk of court for payment of commissions due him, and the clerk authorized all fee requests submitted by defendant; payment of over \$66,000 in commissions was made to defendant, and this was significantly in excess of the maximum commissions allowed by statute; the clerk notified defendant that he had been overpaid and vacated the orders which had authorized payment of the commissions; and rather than repay the improper commissions and reapply for the commissions properly due him, defendant appealed from the clerk's order.

3. Rules of Civil Procedure § 52— findings of fact—conclusions of law distinguished

The trial court sufficiently distinguished the findings of fact from the conclusions of law so that the court on appeal was able to determine how the trial court applied the law to the facts.

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4. Trusts § 6— breach of trust—trustee personally liable

There was no merit to defendant's contention that a trustee, like an officer of a corporation or partner in a partnership, is shielded from personal liability for his actions unless he is personally named and served in an action, since general common law principles hold that a trustee's breach of trust subjects him to personal liability and N.C.G.S. § 36A-76(d) provides that a trustee may be held personally liable for any tort committed by him; therefore, the trial court could properly deny defendant any commissions and could require defendant to pay costs, witness fees, and attorney's fees as damages.

5. Contempt of Court § 7— willful failure to comply with order—order appealed —no contempt pending appeal

Defendant's appeal of an underlying judgment prevented the trial court from finding defendant in contempt until after the appeal was resolved; however, because the order from which defendant's appeal was taken was upheld by the Court of Appeals, willful failure to comply with the order during pendency of the appeal was punishable by contempt on remand.

APPEAL by defendant Weinstein from *Gray, Judge*. Judgment entered 25 July 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 June 1988.

This appeal arises from petitioner James F. Freer's action to remove the trustee of two separate testamentary trusts. Petitioner is the guardian ad litem for Christina Kathleen Pafero (Tina), an income and remainder beneficiary of both the Herbert Jacobs trust and the Bella Lewan Jacobs trust. He filed two separate petitions in the form of special proceedings with the Clerk of Superior Court of Mecklenburg County seeking the removal of Milton Weinstein (Weinstein) as trustee of the two trusts. Petitioner's complaint alleged defendant Weinstein breached his fiduciary duties of trust and loyalty by paying himself commissions in excess of the maximum allowed by statute and by failing to make discretionary payments of income on Tina's behalf. Defendant Weinstein answered and moved to transfer the case to the superior court's civil issue docket pursuant to G.S. 1-399. The clerk transferred the case to superior court where the two petitions were consolidated for a jury trial.

Following a presentation of the evidence the trial court submitted eight issues to the jury. Each issue presented a question of whether defendant breached his fiduciary duties of trust and loyalty. The jury answered each issue against defendant Weinstein. Accordingly, the trial court ordered, *inter alia*, that defendant Weinstein be removed as trustee of both trusts, that

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defendant Weinstein reimburse each trust for the full amount of commissions paid, that defendant Weinstein reimburse each trust for attorney's fees paid in defendant Weinstein's personal defense and that costs of the action, including attorney's fees and expert witness fees, be taxed against defendant Weinstein. Weinstein appeals.

Weinstein did not repay any commissions or attorney's fees as ordered by the trial court; on 16 September 1987 petitioner moved to enforce the judgment. The court entered a show cause order requiring that Weinstein explain his wilful failure to obey the court's judgment. Weinstein was not present at the show cause hearing, but his attorney appeared and moved to dismiss the show cause order for lack of jurisdiction. The trial court denied Weinstein's motion and found him in contempt. From the court's order finding him in contempt, Weinstein also appeals.

Smith Helms Mulliss & Moore, by Robert B. Cordle, William R. Purcell, II, and Neill G. McBryde, for petitioner-appellee.

Collie and Wood, by George C. Collie; Charles M. Welling for defendant-appellant.

Petree Stockton & Robinson, by Ray S. Farris, Guardian Ad Litem for the unborn issue and unknown heirs, defendant-appellees.

Perry, Patrick, Farmer & Michaux, by Bailey Patrick, Jr., Guardian Ad Litem, for Nicole Jacobs and Daniel Jacobs, minors.

EAGLES, Judge.

Defendant Weinstein presents five assignments of error for review. He first argues that the clerk of superior court has exclusive original jurisdiction to remove a trustee and, therefore, the trial court lacked subject matter jurisdiction to hear the case. Next, he contends that the trial court erred in denying his motion for directed verdict at the close of petitioner's evidence and at the conclusion of all the evidence. He further claims that the trial court failed to make separate findings of fact and conclusions of law as required by Rule 52 of the North Carolina Rules of Civil Procedure. Defendant Weinstein assigns as error that portion of the trial court's order requiring that he reimburse all commissions paid him and that he personally pay court costs. Finally, he

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argues that the trial court lacked jurisdiction to find him in contempt. We agree that the trial court lacked jurisdiction to find Weinstein in contempt. Accordingly, we vacate the contempt order, but otherwise we affirm the trial court's judgment.

I

[1] Initially we note that there is a statutory distinction in the required procedures for removing a trustee and those for removing a personal representative or collector. *Compare* G.S. 36A-35 (removal of trustee is pursuant to procedures outlined in G.S. 36A-24 to G.S. 36A-32) *with* G.S. 36A-22(b) (removal of personal representatives and collectors governed by Chapter 28A). Here the petitioner seeks to remove Weinstein as trustee of the Jacobs' trusts but does not seek his removal from his position as the Jacobs' personal representative.

Removal of the trustee here must be accomplished in accordance with G.S. 36A-35 which provides, in part, that

[a]ny beneficiary, cotrustee or other person interested in the trust estate may file a petition in the office of the clerk of superior court of the county having jurisdiction over the administration of the trust for the removal of a trustee or cotrustee who fails to comply with the requirements of this Chapter or a court order, or who is otherwise unsuitable to continue in office. Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the petitioner as plaintiff.

Freer filed these petitions with the Mecklenburg County Clerk of Superior Court. Shortly thereafter Weinstein answered maintaining, *inter alia*, defenses of laches, estoppel, and unclean hands. Upon Weinstein's motion the clerk of court transferred the action to the civil issue docket. G.S. 1-399; *see Little v. Duncan*, 149 N.C. 84, 62 S.E. 770 (1908) (clerk of court must transfer case when equitable defenses raised). Defendant now argues that the clerk of court has exclusive and original jurisdiction of all probate matters and, therefore, transfer of the case to the civil issue docket was improper. We disagree.

As noted in *Ingle v. Allen*, 69 N.C. App. 192, 196, 317 S.E. 2d 1, 3 (1984), our courts distinguish cases which "arise from" the administration of an estate from those which are "a part of" the ad-

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ministration and settlement of an estate. Those cases which are "a part of" the administration of an estate are considered probate matters in which the clerk of superior court has exclusive original jurisdiction. *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976). These two testamentary trusts will exist for ten years; at that time the corpus must be distributed to the remaindermen. In all likelihood the administration of the individual decedents' estates will be closed prior to the dissolution of the trusts. Without regard for when the estates are closed, the administration of these testamentary trusts will continue for the prescribed period. Petitioner here alleges breach of fiduciary duties. Our Court has held that this issue is a civil matter which is not "a part of" the administration of these estates, but rather "arises from" their administration. *Ingle* at 195, 317 S.E. 2d at 3. Furthermore, when a special proceeding begun before the clerk is transferred to the superior court, the judge may "determine all matters in controversy." G.S. 1-276; *Plemons v. Cutshall*, 230 N.C. 595, 55 S.E. 2d 74 (1949). Accordingly, we hold that transfer of the case was proper and that the trial court had jurisdiction to hear the case.

II

[2] Defendant Weinstein next assigns as error the trial court's denial of his motions for a directed verdict at the close of petitioner's evidence and at the conclusion of all the evidence. He argues that petitioner's evidence was insufficient to show that he abused his discretion in making income distributions to Tina. By his introduction of evidence defendant waived his motion for directed verdict at the close of petitioner's evidence, *Rice v. Wood*, 82 N.C. App. 318, 346 S.E. 2d 205, *disc. rev. denied*, 318 N.C. 417, 349 S.E. 2d 599 (1986), and, therefore, we consider only his motion for directed verdict at the conclusion of all the evidence.

Though appellant defendant frames his arguments in the context of abuse of discretion by a trustee of a discretionary trust, the dispositive question here is whether petitioner presented sufficient evidence for a jury to find that Weinstein "fail[ed] to comply with the requirements of . . . Chapter [36A] or a court order, or . . . [was] otherwise unsuitable to continue in office." G.S. 36A-35. We hold that petitioner presented sufficient evidence for his case to go to the jury. Accordingly, we overrule this assignment of error.

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Trust beneficiaries may expect and demand the trustee's complete loyalty in the administration of any trust. Should there be any self-interest on the trustee's part in the administration of the trust which would interfere with this duty of complete loyalty, a beneficiary may seek the trustee's removal. *See Trust Co. v. Johnson*, 269 N.C. 701, 153 S.E. 2d 449 (1967). If a conflict of interest arises, the trustee must either remove the personal interest or resign his position as trustee. Bogert, *The Law of Trusts and Trustees*, section 543 (rev. 2d ed. 1978). In support of this rule of complete loyalty our Supreme Court has quoted Chief Justice Cardozo.

"A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions, . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Trust Co. v. Johnson, 269 N.C. 701, 711, 153 S.E. 2d 449, 457 (1967) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928)).

In the light most favorable to petitioner, his evidence showed the following. Petitioner is the guardian ad litem for Christina Kathleen Pafero (Tina), a minor child who is an income and remainder beneficiary of two separate testamentary trusts established by her grandparents. Tina's mother is currently incarcerated serving a life sentence in Florida and her father is incarcerated on Florida's death row for the murder of two Florida highway patrol officers. Upon her parents' convictions Tina went to live with her maternal grandparents, Herbert Jacobs and Bella Lewan Jacobs. Her grandparents reared her until their deaths when Tina was eight years old. Each of her grandparents' wills named Tina as an income and remainder beneficiary of their respective trusts and named Weinstein as trustee of each trust. The trust language required that defendant Weinstein make discretionary income payments on Tina's behalf.

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As trustee of both trusts, Weinstein petitioned the clerk of court for payment of commissions due him. The clerk of court authorized all fee requests submitted by Weinstein. Payment of over \$66,000 in commissions was made to Weinstein. Expert testimony revealed that this was significantly in excess of the maximum commissions allowed by statute. Thereafter the clerk notified Weinstein that he had been overpaid and vacated the orders which had authorized payment of the commissions. The clerk's order stated, however, that Weinstein could reapply for the appropriate commissions. Rather than repay the improper commissions and reapply for the commissions properly due him, Weinstein appealed from the clerk's order. By appealing the clerk's order defendant Weinstein placed his personal self-interest ahead of the trust beneficiaries' interests which would demand that only commissions authorized by statute be paid. This evidence is more than sufficient for the jury to conclude that Weinstein's personal interests were in direct conflict with the trust beneficiaries' interests so that breach of loyalty could be found. *Cf. Lightner v. Boone*, 221 N.C. 78, 19 S.E. 2d 144 (1942) (where testatrix set amount of executor's commissions in will, executor must either decline to qualify or accept the amount as set out for his commission). This assignment of error is without merit.

III

[3] In his third assignment of error Weinstein argues that the trial court erred in failing to include in its judgment separate findings of fact and conclusions of law. Rule 52 of the North Carolina Rules of Civil Procedure requires that the trial court make specific findings of fact and conclusions of law so that the appellate courts may determine whether the trial court has correctly applied the law to the facts. *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). The trial court complies with this requirement so long as it distinguishes the findings of fact from the conclusions of law in some recognizable fashion. *Highway Church of Christ v. Barber*, 72 N.C. App. 481, 325 S.E. 2d 305 (1985). As an example, the trial court here, after listing the jury issues and verdict, stated:

The court has considered the jury findings and all of the evidence before it, including Mr. Weinstein's evidence that his actions as Trustee were pursuant to advice of counsel. Based

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upon the foregoing, the Court finds and concludes that Mr. Weinstein has failed to comply with the requirements of Chapter 36A of the North Carolina General Statutes in the respects shown by the jury's verdict, which verdict the Court incorporates by reference as its findings of noncompliance and that Mr. Weinstein is unsuitable to continue in the offices of Trustee of the Trust of Herbert Jacobs and Trustee of the Trust of Bella Lewan Jacobs.

Though not explicitly labeled a conclusion of law, the paragraph quoted can be distinguished from the separately listed findings of fact concerning noncompliance with Chapter 36A. These findings had been submitted to the jury as issues. While the better practice is to separately label the findings of fact and conclusions of law, we find that there is no prejudicial error here. The trial court sufficiently distinguished the findings of fact from the conclusions of law so that we are able to determine how it applied the law to the facts. We overrule this assignment of error.

IV

[4] Defendant next argues that the suit was brought against him only in his official capacity as trustee and, consequently, the trial court's order improperly created a personal judgment against him because he was not a party to this action. The thrust of defendant Weinstein's argument is that a trustee like an officer of a corporation or partner in a partnership, is shielded from personal liability for his actions unless he is personally named and served in an action. We disagree. Neither a trust estate nor trust property are recognized as separate legal entities which grant a trustee protection from the consequences of his actions. Bogert, *The Law of Trusts and Trustees*, sections 718, 731 (rev. 2d ed. 1982). General common law principles hold that a trustee's breach of trust subjects him to personal liability. IIIA Scott on Trusts, section 261 (4th ed. 1988); 76 Am. Jur. 2d, Trusts, section 304. Furthermore, G.S. 36A-76(d) provides, in part, that a trustee may "be held personally liable for any tort committed by him."

G.S. 36A-81 provides that when a trustee violates any provision of the Uniform Trusts Act, G.S. 36A-60, *et seq.*, "he may be removed and denied compensation in whole or in part." Here the court found that defendant had breached his fiduciary duties and because of his breach was not entitled to any commissions. The

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trial court made no findings showing a breach of the Uniform Trusts Act. The trial court, however, sitting as a court of equity, has the discretion to deny the trustee any or all of his commissions. Bogert, *The Law of Trusts and Trustees*, section 861 (rev. 2d ed. 1982). Furthermore, damages for breach of trust are designed to restore the trust to the same position it would have been in had no breach occurred. Bogert, section 543(V); Restatement 2d, *Trusts*, section 206. Moreover, the court may fashion its order "to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee." Bogert, section 543(V). The court's order mandating payment of costs, witness fees, and attorney's fees was a proper assessment of damages. *Id.* We overrule this assignment of error.

V

[5] Defendant's fifth and final assignment of error attacks the trial court's contempt order claiming the trial court was without proper jurisdiction. We agree and vacate the contempt order.

The trial court entered judgment ordering defendant's removal as trustee on 25 July 1987 from which defendant Weinstein appealed. The trial court denied defendant's motion for a stay. This Court granted an ex parte temporary stay on 3 August 1987 which we vacated on 25 August 1987. The Supreme Court subsequently denied defendant's petition for a stay. Defendant Weinstein posted no bond to stay execution against him. On 16 September 1987 petitioner filed a motion to enforce the trial court's judgment. The trial court issued an order for defendant to show cause why he should not be held in contempt. Defendant did not appear personally at the show cause hearing, but his attorney was present and objected that the court lacked jurisdiction to hold defendant in contempt.

The general rule here is that "appeal stays contempt proceedings until the validity of the judgment is determined." *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E. 2d 724, 727 (1962). Unless a stay is in effect, however, execution may be had during the pendency of an appeal. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). During the pendency of this appeal the trial court found defendant in contempt. Defendant's appeal of the underlying judgment prevents the trial court from finding defendant in contempt until after the appeal is resolved. *Id.* The Supreme Court has

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ruled that “[i]f the order from which an appeal is taken is upheld by the appellate court, wilful failure to comply with the order during pendency of the appeal is punishable by contempt on remand.” *Id.* at 461, 290 S.E. 2d at 663. Having here affirmed the underlying order we remand the issue of contempt to the trial court for reconsideration.

Affirmed in part; vacated and remanded in part.

Judges ORR and SMITH concur.

MARVIN J. HARRIS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE CO.

No. 872SC461

(Filed 16 August 1988)

1. Insurance § 126— fire insurance—material misrepresentation as to ownership—misrepresentation knowingly and willfully made—findings required

Where plaintiff clearly made a false representation of ownership to defendant after a fire, and the representation was material, the trial court was required to make findings and conclusions as to whether plaintiff knowingly and willfully made the false statements following the fire and thus whether the insurance policy issued by defendant was voided. N.C.G.S. § 158-76(c).

2. Insurance § 131— fire insurance—premises leased with option to buy—improvements made by insured—computation of loss

In an action to recover on a fire insurance policy where plaintiff leased a house with an option to purchase and made improvements thereon, the unexercised option to purchase was a mere expectancy and did not qualify as an insurable interest; the improvements were to become part of the real estate and were to be treated as additional rent at the end of the lease term so that plaintiff had less than an absolute interest in the improvements; plaintiff therefore was entitled to recover the value of the use of the house, including the use of the improvements made by plaintiff for a period of time corresponding to the unexpired term of the lease; and the trial court erred in awarding plaintiff the exact cost of the improvements made by him to the property.

APPEAL by defendant from *Llewellyn (James D.), Judge*. Judgment entered 12 February 1987 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 17 November 1987.

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Rodman, Holscher, Francisco & Peck, P.A., by David C. Francisco, for plaintiff-appellee.

Baker, Jenkins & Jones, P.A., by Ronald G. Baker and W. Hugh Jones, Jr., for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment of the trial court ordering it to pay \$17,723.98 to plaintiff for fire damage to a house insured by the defendant. The matter was tried before the trial judge sitting without a jury.

The undisputed evidence tends to show that on 4 January 1985, plaintiff leased certain property for a period of two years with an option to purchase. On 25 March 1985, plaintiff obtained a standard fire insurance policy from defendant insuring the house in the amount of \$25,000. The policy conformed in all respects to N.C.G.S. Sec. 58-176 (1982). Plaintiff paid all premiums. On 26 September 1985, the house was destroyed by fire. At the time of the fire, plaintiff had not purchased the property but had expended approximately \$17,723.98 on repairs to a house located on the property. After the fire, plaintiff gave a written statement to an adjuster for defendant in which he stated he had purchased the property in January 1985. The record indicates that as of 2 February 1987, the date of the trial, plaintiff continued to lease the properties and has never purchased them.

In its answer, defendant alleged misrepresentations of material facts both prior to the issuance of the policy and after the fire which it contends voided the policy. After hearing evidence from both sides, the trial court concluded plaintiff at no time concealed any material facts from defendant and awarded plaintiff \$17,723.98.

The issues presented are: I) whether the plaintiff's representation of his interest in the property voided the policy of insurance; and II) whether the court erred in awarding plaintiff \$17,723.98 in damages.

I

[1] N.C.G.S. Sec. 158-76(c) provides in pertinent part that the entire fire insurance policy is void if,

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. . . whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Our Supreme Court has held that to void a fire insurance policy, the insurer must prove the insured knowingly and willfully made statements that were false and material. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 370, 329 S.E. 2d 333, 338 (1985).

Defendant pled in its answer and now argues on appeal that the policy is void because of material misrepresentations made to it after the fire loss. Since the issue of whether plaintiff willfully and knowingly made a material misrepresentation was joined in the pleadings, the trial judge, sitting as fact finder, was required to find the facts on this issue, declare conclusions of law from the facts found and enter a judgment accordingly. *Coggins v. City of Asheville*, 278 N.C. 428, 434, 180 S.E. 2d 149, 153 (1971); see N.C.G.S. Sec. 1A-1, Rule 52(a) (1983).

The trial judge entered the following pertinent findings of fact:

. . . .

2. That the plaintiff in this action, Marvin J. Harris, is married to Mary Ann Harris, who assists her husband in a farming operation.

3. That pursuant to the plaintiff's request his wife, Mary Ann Harris, traveled to the defendant's place of business in Washington, North Carolina on or about the 25th day of March, 1987 [sic] to secure dwelling insurance on a farm structure which was located on a farm owned by Don Nobles and his mother, Cassie Nobles.

4. That on the date of March 25, 1985 the plaintiff was not the owner of the property which was the subject of this insurance policy.

. . . .

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7. That the application for insurance was not executed by the plaintiff, Marvin J. Harris, but his signature was affixed thereto by defendant's agent, Lloyd Tippett.

8. That defendant's agent Tippett was never told by Marvin Harris upon application for the insurance in question that they were the owners of the property.

9. That plaintiff paid the premium for said insurance policy and said policy of insurance was issued by the defendant.

10. That the plaintiff had caused the property in question to be renovated extensively at an expense of \$17,723.98.

. . . .

The trial court's judgment contained no findings of fact or conclusions of law on the issue of whether plaintiff's written post-loss statement of his interest was a willful concealment or willful misrepresentation of material fact. North Carolina Rule 52(a)(1) is similar to Federal Rule 52(a) and therefore this Court may use the federal courts' interpretations of the rule for guidance. *See Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976). When a trial court fails to make findings or conclusions when they are required, the appellate court "may order a new trial or allow additional evidence to be heard by the trial court or leave it to the trial court to decide whether further findings should be on the basis of the existing record or on the record as supplemented." C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 2577 at 698 (1971) (citing federal cases). However, a remand to the trial court is not necessary if the facts are not in dispute and if only one inference can be drawn from the undisputed facts. *See id.* at 701; *see also Gulf Towing Co. v. Steam Tanker Amoco*, N.Y., 648 F. 2d 242, 245 (1981) (where trial judge failed to make adequate findings of fact remand is not required "if a complete understanding of the issues is possible in the absence of separate findings and if there is a sufficient basis for the appellate court's consideration of the merits of the case").

It is not disputed that plaintiff gave a written statement to the defendant's adjuster in which he said he "purchased the house" and that the total cost of the land and house was "\$262,500." Furthermore, neither party disputes that plaintiff did

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not own the land or house on the date the policy was issued or on the date of the fire. Therefore, the representation of ownership made by plaintiff to defendant after the fire was clearly false. This false representation was material since the information relating to the ownership of the house directly affects the amount of the loss as the policy provided coverage to the extent of "the interest of the insured."

However, whether plaintiff willfully and knowingly made the false representations of material facts is a matter of dispute. A willful misrepresentation is a statement made "deliberately and intentionally knowing it to be false." *Bryant*, 313 N.C. at 374, 329 S.E. 2d at 340. Plaintiff asserts he did not intend to defraud the insurer and that he was "ignorant of how I should have explained everything" to the defendant. The plaintiff further testified he had no "intent to hoodwink" the insurer and that he only wanted to insure the property to "protect all [the] money" he had expended on repairing the house. Additionally, in applying for the insurance, plaintiff never told defendant he owned the property.

From the record before us, we are unable to determine whether plaintiff's misrepresentations to defendant were willful and knowing. See 5A J. Appleman, *Insurance Law and Practice* Sec. 3592 at 621 (1970) (citing case where insured claimed in proof of loss that he owned the fee when in fact he owned only an insurable interest by virtue of being an heir—court found a question of fact existed as to fraud on insured's part). Accordingly, as these issues are questions of fact not yet determined by the trial court, we remand with instructions for the trial judge to make findings and conclusions on the issue of whether plaintiff knowingly and willfully made the false statements following the fire. If necessary for a full determination of the issue, the trial judge may allow additional evidence on whether plaintiff's false representations were willfully and knowingly made.

II

[2] Should the trial judge determine plaintiff did not willfully and knowingly make a material misrepresentation, it will be necessary to determine the amount of the award due plaintiff. As lessor, plaintiff did have an insurable interest in the premises. See *King v. National Union Fire Ins. Co.*, 258 N.C. 432, 434, 128 S.E. 2d 849, 852 (1963) (person has insurable interest if he is so con-

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nected to the property that he would suffer pecuniary loss from its destruction). Defendant contends the award of \$17,723.98 is excessive and does not reflect the value of plaintiff's interest in the property. The policy provides that the amount of coverage available to the plaintiff may not in any event exceed plaintiff's interest in the property. Property insurance is a contract of indemnity, 3 *Couch on Insurance* 2d Sec. 24:12 at 33 (M. Rhodes rev. ed. 1984), and plaintiff is entitled to recover only for his actual loss as determined at the time of the fire. See *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 318-19, 344 S.E. 2d 555, 560-61, disc. rev. denied, 318 N.C. 284, 348 S.E. 2d 344 (1986).

At the time of the fire, the twenty-four month lease was into its ninth month. The lease granted the plaintiff the option to purchase the properties and the right to make improvements. The lease further provided that if the plaintiff did not purchase the property, "all improvements and repairs shall be considered a part of the real estate and taken" as additional rent. Plaintiff contends that in valuing his insurable interest, we should consider the length of the unexpired term of the lease, the option to purchase the property and the improvements made to the property.

The unexercised option to purchase was a mere expectancy and does not qualify as an insurable interest. See *Allstate Ins. Co. v. Thompson*, 164 Ga. App. 508, 510, 297 S.E. 2d 520, 522 (1982); *Travelers Indemnity Co. v. Duffy's Little Tavern, Inc.*, 478 So. 2d 1095, 1096 (Fla. App. 5th Dist. 1985), rev. denied, 488 So. 2d 68 (1986); *Vendriesco v. Aetna Cas. & Surety Co.*, 68 A.D. 2d 946, 414 N.Y.S. 2d 64, 65 (1979); *Christ Gospel Temple v. Liberty Mut. Ins. Co.*, 273 Pa. Super. 302, 309, 417 A. 2d 660, 663 (1979), cert. denied *sub nom.; Presbyterian Church of Harrisburg v. Liberty Mut. Ins. Co.*, 449 U.S. 955, 101 S.Ct. 362, 66 L.Ed. 2d 220 (1980); *Erie-Haven, Inc. v. Tippmann Refrigeration Const.*, 486 N.E. 2d 646, 650 (Ind. App. 3d Dist. 1985).

Since improvements were to become part of the real estate and were to be treated as additional rent at the end of the lease term, plaintiff had less than an absolute interest in the improvements. As such, plaintiff as lessee, is entitled to recover the value of the use of the house, including the use of the improvements made by plaintiff for a period of time corresponding to the unexpired term of the lease. See *Ingold v. Phoenix Assurance Co.*,

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230 N.C. 142, 146, 52 S.E. 2d 366, 369 (1949); see also *Vendriesco*, 68 A.D. 2d at 947, 414 N.Y.S. 2d at 65; see generally Annotation, *Improvements and Betterments Insurance*, 97 A.L.R. 2d 1243, 1251-54 (1964).

The trial court determined the lessee was entitled to \$17,723.98, which represents the exact cost of the improvements made by the lessee to the properties. The findings of fact entered by the trial court indicate it considered only the costs of the improvements in its award. In the event the damage issue is reached on remand, the damages are to be determined by the trial court by fixing plaintiff's loss of use of the house and its improvements for the period corresponding to the unexpired lease term. The trial court in its discretion may consider additional evidence on this issue as well.

Vacated and remanded.

Judges BECTON and PHILLIPS concur.

ANN JOYCE v. WINSTON-SALEM STATE UNIVERSITY

No. 8810SC74

(Filed 16 August 1988)

State § 12— employee not promoted—arbitrary and capricious action of State Personnel Commission—promoting from within policy—improper hiring procedure

The trial court properly found that the State Personnel Commission acted arbitrarily and capriciously in denying petitioner's promotion, and the Commission's findings of fact and decision were not supported by substantial evidence where the evidence tended to show that, prior to October 1982, petitioner had been employed by respondent in its personnel office for eight years; in November 1982 and again in August 1983 petitioner applied for promotions; it is the established policy of the Commission to promote from within whenever practicable, but the Commission failed in its review of petitioner's appeal to make any finding relative to this policy, thus indicating a lack of fair and careful consideration; there was evidence that the person who was hired for the vacancy in 1983 filed her application a month before notice was actually posted, was offered the job before it was posted, and did not meet the stated qualifications for the position, yet the Commission made no findings with respect to abuse of discretion or improper procedure; and essentially the only evidence relied on by the Commission to decide against petitioner was the un-

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substantiated opinion of her superior that petitioner was uncooperative and difficult to work with, but the record contained much evidence to the contrary.

APPEAL by respondent from *Bailey, James H. Pou, Judge*. Order entered 28 August 1987 in WAKE County Superior Court. Heard in the Court of Appeals 1 June 1988.

Prior to October 1982 the petitioner had been employed by respondent Winston-Salem State University (WSSU) as a Personnel Technician I for approximately eight years. In October 1982 Ms. Fannie Williams assumed the position of Personnel Director at WSSU with the mandate to make more efficient the operation of the personnel office and to improve its image. After Ms. Williams' installment the petitioner twice sought a promotion within respondent's personnel office, but was passed over both times. On the first occasion WSSU posted in November 1982 a notice of vacancy for the position of Personnel Officer and established a search committee to screen the applicants. The petitioner applied and was ranked fifth by the search committee on its list of the 39 applicants. The University eventually hired Ms. Esther Keith, whom the search committee had ranked first on its list.

In June 1983 Ms. Keith gave notice of resignation. On 22 August 1983 WSSU posted notice of a vacancy for the position of Personnel Technician, and the qualifications for the position were also announced. Deeming herself qualified, petitioner applied once again. This time WSSU offered the job to Ms. Sylvia Gwyn, who had been ranked third by the search committee during the previous search.

The petitioner then filed a grievance with the University grievance committee, which concluded that the evidence was insufficient to find an infraction of any relevant policy, and on 18 January 1984 Mr. Douglas Covington, Chancellor of WSSU, informed the petitioner that he concurred with the conclusions of the grievance committee. Petitioner then appealed her non-selection to the State Personnel Commission (Commission) pursuant to N.C. Gen. Stat. §§ 126-35 and 126-37, principally alleging that respondent WSSU had abused its discretion and not followed proper procedure in its promotion decisions of November 1982 and August 1983. A hearing was held on 1 July 1985, and on 16 October the hearing officer filed her Opinion including findings of

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fact, the conclusion that respondent WSSU did not abuse its discretion in failing to promote petitioner, and the recommendation that the decision by respondent not to promote be left undisturbed. On 5 December the Full Commission by Decision and Order adopted as its own the Opinion of its hearing officer.

Thereupon, the petitioner filed in Wake County Superior Court a petition for judicial review of the Commission's decision pursuant to N.C. Gen. Stat. § 150A-43. A hearing was held, and by Order entered 17 August 1987 the trial court reversed the decision of the Full Commission and ordered that the petitioner be granted the denied promotion and full back pay and benefits retroactive to 1 September 1983. In its Order the trial court made the following findings:

1. That the State Personnel Commission acted arbitrarily and capriciously in denying the Petitioner a promotion due to its failure to consider the following uncontradicted evidence in the record herein:

- a. The Respondent failed to consider the promotion policy promulgated by the State Personnel Commission when the Petitioner applied for promotions in November of 1982 and August of 1983.
- b. The Respondent, by and through its Personnel Director, Ms. Fannie Williams, told Ms. Sylvia Gwyn in July of 1983 that she had been chosen for the position which was not posted for vacancy until August of 1983, and for which the Petitioner applied.
- c. Ms. Gwyn filed her application for that position in July of 1983.
- d. Ms. Gwyn did not meet the qualifications of the posted vacancy in that she possessed only two (2) years personnel experience instead of the requisite six (6) years.
- e. The Petitioner was qualified for the position.

2. The findings of fact and decision of the State Personnel Commission are not supported by substantial evidence in view of the entire record nor is there, based upon the evi-

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dence, a rational basis for the Commission's decision to deny the Petitioner a promotion.

Respondent WSSU appealed.

Lawrence J. Fine for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kaye R. Webb, for respondent-appellant.

WELLS, Judge.

The question is whether the trial court properly found that the Commission's decision to deny petitioner her promotion was (1) arbitrary and capricious and (2) unsupported by substantial evidence in view of the whole record. After careful scrutiny of the Record and consideration of the arguments of the parties, we conclude, for reasons to follow, that the trial court's Order must be affirmed.

At the time this case was commenced, N.C. Gen. Stat. § 150A-51 (now codified as G.S. § 150B-51) provided the scope of review of decisions of administrative agencies. In pertinent part, the statute authorized a reviewing court to modify or reverse an agency's decision if

the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

. . .

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. Ch. 150A (April 1983 Replacement). Our Supreme Court agrees that an agency decision is arbitrary and capricious if it clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decisionmaking. See *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980). In the present case our review confirms that the Commission's adopted Opinion reflects a failure to consider that respondent WSSU took no account of the Commission's own promotion policy in making its

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decision not to promote Ms. Joyce. Pursuant to N.C. Gen. Stat. § 126-4(6) the State Personnel Commission has promulgated, in pertinent part, the following promotion policy: "Promotion is a change in status upward . . . resulting from assignment to a position of higher level. When it is practical and feasible, a vacancy should be filled from among the eligible permanent employees. Selection should be based upon demonstrated capacity, quality, and length of service." N.C. Admin. Code tit. 25, r. 1D.0301 (Oct. 1987). Thus, it is the established policy of the Commission that vacancies should be filled from within whenever practicable; and the Commission's failure in its review of petitioner's appeal to make any finding relative to this established policy evinces a lack of fair and careful consideration.

Furthermore, our review confirms that the Commission made no finding relevant to evidence that Ms. Gwyn filed her application for the August 1983 opening a month before notice of it was actually posted, or Ms. Gwyn's testimony that Ms. Williams effectively offered her the job before it was posted, or that Ms. Gwyn was hired even though she did not meet the stated qualifications for the position. This was critical evidence in view of the fact, as indicated above, that the two principal issues in petitioner's appeal to the Commission were whether respondent had abused its discretion in not promoting petitioner and whether the respondent had followed proper procedure in its hiring decision. In view of the stated issues involved, the Commission's failure to make findings with respect to such telling evidence of abuse of discretion and improper procedure clearly betrays a want of careful and impartial decisionmaking.

Our review of the Record also confirms the trial court's determination that the Commission's findings of fact and decision were not supported by substantial evidence in view of the entire Record. In reviewing an administrative decision to determine if it is supported by substantial evidence, the court must apply the "whole record" test. *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 342 S.E. 2d 914, cert. denied, 318 N.C. 507, 349 S.E. 2d 862 (1986). Under the "whole record" test the reviewing court must consider not only the evidence that supports the agency's decision, but also contradictory evidence or evidence from which conflicting inferences might be drawn. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). If an agency deci-

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sion is not supported by substantial evidence in view of the entire record as submitted, it may be reversed. *General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 338 S.E. 2d 114 (1985). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882 (1977); and substantial evidence "is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 293 S.E. 2d 171 (1982).

In the present case we find that essentially the only evidence relied on by the Commission to decide against the petitioner was the unsubstantiated opinion of Ms. Williams that the petitioner was uncooperative and difficult to work with. However, the Record contains on this point much evidence to the contrary. For example, Ms. Beverly Wilson, a secretary in the Personnel Office, testified that she had never observed petitioner express an unwillingness to assist Ms. Williams. And Ms. Gwyn testified that she had never noticed Ms. Joyce being unwilling to assist Ms. Williams or anyone else.

In its eleventh finding of fact the Commission includes excerpts from a negative pre-evaluation letter prepared by Ms. Williams for the petitioner in May 1983. However, the Commission's Opinion ignores the official evaluation completed one month later that gave the petitioner a very positive evaluation of her work. Furthermore, prior to Ms. Williams' installment as Personnel Director, the petitioner had received outstanding evaluations from her superior, Dr. Bernell Jones. Dr. Jones testified that petitioner was dependable and professional and "stood out more so than anyone else in the office while I was working there." Esther Turman, another employee of the respondent's personnel office, also testified that Ms. Joyce was a diligent worker and was knowledgeable about the responsibilities of the office. Ms. Gwyn herself impliedly conceded that when she was hired in 1983 instead of petitioner, the petitioner was more qualified for the job because of her experience.

In sum, our review of the whole Record as submitted persuades us that the Commission's conclusion that respondent did not abuse its discretion in failing to promote petitioner is not only unsupported by substantial evidence, but is overwhelmingly refut-

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ed by evidence to the contrary. We hold that the trial court correctly found that the Commission acted arbitrarily and capriciously in denying petitioner's promotion and that the Commission's findings of fact and decision were not supported by substantial evidence in view of the entire record.

Thus, the Order of the trial court must be, and is

Affirmed.

Judges BECTON and PHILLIPS concur.

HAROLD R. HOKE AND FRANCES C. HOKE v. E. F. HUTTON AND COMPANY, INC.

No. 8726SC1211

(Filed 16 August 1988)

1. Appeal and Error § 6.2— dismissal of only one claim—substantial right affected—appealability

The trial court's order dismissing plaintiffs' allegations of violations of the federal "Racketeer Influenced and Corrupt Organizations Act," though not final as to all claims, was nevertheless immediately appealable, since a plaintiff has a substantial right to have all claims for relief tried simultaneously before the same judge and jury.

2. Courts § 5— federal law—state court's jurisdiction concurrent with federal court's jurisdiction

The trial court erred in dismissing plaintiffs' claims alleging violations of the federal "Racketeer Influenced and Corrupt Organizations Act" on the ground that it lacked subject matter jurisdiction, since there is a presumption that the state courts have concurrent jurisdiction with the federal courts in RICO actions; there is no Congressional provision mandating exclusive federal jurisdiction; and there is no disabling incompatibility between the federal claim and state court adjudications.

3. Brokers and Factors § 4— check-kiting scheme—no relation to investment losses—RICO claim properly dismissed

Plaintiffs failed to state a claim under the federal "Racketeer Influenced and Corrupt Organizations Act," since their allegation that defendant engaged in a check-kiting scheme could not serve as a "predicate act" for their claim because there was no relation shown between the check-kiting and their enormous loss on their investment with defendant.

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PLAINTIFFS appeal from *Snepp, Frank W., Jr., Judge*. Judgment entered 17 September 1987 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 6 June 1988.

This appeal stems from an action involving alleged violations of state and federal securities laws. Plaintiffs' initial Complaint filed November 1983 alleged a cause of action for misrepresentation and breaches of contract and fiduciary duty. Plaintiffs later took a voluntary dismissal on 9 August 1985. The present action was filed on 4 August 1986 which renewed the allegations contained in the 1983 complaint and also included allegations of violations of the federal "Racketeer Influenced and Corrupt Organizations Act" (RICO) 18 U.S.C. § 1961, *et seq.* Defendant moved to dismiss the action pursuant to Rules 12(b)(1) and 12(b)(6) of the N.C. Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Rule 12(b). The trial court granted the motion as to Counts 3, 4 & 5 of plaintiffs' Amended Complaint by Order dated 17 September 1987 which dismissed plaintiffs' RICO claim. Plaintiffs' remaining claims of breach of contract, breach of fiduciary duty, and misrepresentation are still pending before the Superior Court. From the grant of defendant's Motion to Dismiss, plaintiffs have appealed.

Gillespie, Lesesne & Connette, by Louis L. Lesesne, Jr.; and Elam, Seaford & McGinnis, by William H. Elam, for plaintiffs-appellants.

Kennedy, Covington, Lobdell & Hickman, by Edgar Love, III, for defendant-appellee.

COZORT, Judge.

[1] The trial court's Order dismissing only Counts 3, 4 & 5 of plaintiffs' Amended Complaint, not being final as to all claims, *see* N.C. Gen. Stat. § 1A-1, Rule 54(b) of the N.C. Rules of Civil Procedure, requires us to determine whether the trial court's Order was immediately appealable. Given our Supreme Court's construction of Rule 54(b) in *Ostreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976) establishing the rule that a plaintiff has a substantial right to have all claims for relief tried simultaneously before the same judge and jury, we hold that plaintiffs' appeal is properly before us.

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[2] Plaintiffs first contend that the trial court erred in dismissing the RICO claims on the basis of Rule 12(b)(1), i.e., that the trial court lacked subject matter jurisdiction over the RICO claims. Although we note that defendants have, in their brief on appeal, conceded the jurisdiction issue, we nevertheless choose to address this issue.

While the decisions are split on the question of federal versus state jurisdiction in RICO actions, see *Brandenburg v. First Maryland Sav. & Loan, Inc.*, 660 F. Supp. 717 (D.Md. 1987), in light of the U.S. Supreme Court's decision in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 69 L.Ed. 2d 784, 101 S.Ct. 2870 (1981), we find persuasive those cases which have found the state courts' jurisdiction to be concurrent with that of the federal courts. *Lou v. Belzberg*, 834 F. 2d 730 (9th Cir. 1987), cert. denied, --- U.S. ---, 99 L.Ed. 2d 512, 108 S.Ct. 1302 (1988); *Brandenburg*, 660 F. Supp. at 717; *Village Imp. Ass'n of Doylestown v. Dow Chemical*, 655 F. Supp. 311 (E.D. Pa. 1987). The general rule in RICO and similar federal actions presumes concurrent jurisdiction over federal claims as between state and federal courts. This presumption, however, may be rebutted only by showing the existence of a Congressional provision establishing sole federal jurisdiction, a clear implication of exclusivity from the relevant legislative history or a "disabling incompatibility between the federal claim and state court adjudication." *Gulf Offshore*, 453 U.S. at 477-78, 69 L.Ed. 2d at 791, 101 S.Ct. at 2875; cf. *Belzberg*, 834 F. 2d at 738.

The Record and our research reveals no evidence of a Congressional provision mandating exclusive federal jurisdiction nor can we find any relevant legislative history indicating the same. Finally, we can find no potential for incompatibility as state court judges should be equally as adept at adjudication of RICO actions especially where the predicate acts or racketeering activities are comprised of what amount to state actions, i.e., fraud, misrepresentation, breach of contract, etc. Because defendant has not attempted to rebut this presumption in its appeal and more importantly because we agree with the reasoning of the *Belzberg* Court, we hold that the trial court erred in granting defendant's motion as based on Rule 12(b)(1).

[3] Defendant also moved to dismiss Counts 3, 4 & 5 of the Amended Complaint under Rule 12(b)(6) for failing to state a claim for relief. Because we find that plaintiffs have failed to sufficient-

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ly allege a nexus between the racketeering activity or predicate act as required by § 1962(c), and their investment loss, we hold that the trial court properly dismissed plaintiffs' RICO claim.

In their Amended Complaint, plaintiffs set forth the following facts: In October 1980, defendant's agents contacted plaintiffs and suggested that plaintiffs transfer money secured by a stock account, which at that time was invested with defendant, to a commodity account. Plaintiffs allege that in reliance on defendant's representations that the manager of the commodity account held excellent credentials and that plaintiffs could expect to earn a return of 40%, plaintiffs authorized the transaction through a Power of Attorney. Thereafter defendant's agent made an excessive number of transactions in a short time period which generated larger commission fees for defendant at a substantial loss to plaintiff.

Contemporaneously, from July 1980 to February 1982, defendant company had been involved in an enormous check-kiting scheme which had artificially inflated the market price of defendant's common stock on which plaintiffs relied. Plaintiffs were unaware of this scheme until May 1985 when defendant pled guilty to 2,000 counts of federal wire and mail fraud charges. During the period in which the check-kiting scheme took place, defendant continued to file annual and periodic reports with the SEC and other public agencies which perpetuated the defendant's image as a "law abiding and well-run enterprise." Plaintiffs claim that they had relied on this reputation when they agreed to make the transfer to the commodities account.

Plaintiffs alleged in Counts 3 through 5 that defendant's check-kiting scheme gave rise to a pattern of racketeering which affected interstate commerce. Further, plaintiffs alleged that such activity artificially inflated the price of defendant's common stock and induced plaintiffs' reliance on defendant thereby allowing the stock churning incident to occur. As a result of the stock churning, plaintiffs sustained an enormous loss on their investment. This argument is specious at best.

Title 18 of the U. S. Code, Chapter 96 was designed to prevent and punish corrupt business practices evidenced by patterns of racketeering, and particularly derived from organized crime, which affected interstate commerce. *United States v. Lemm*, 680

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F. 2d 1193 (8th Cir. 1982), cert. denied, 459 U.S. 1110, 74 L.Ed. 2d 960, 103 S.Ct. 739 (1983); *United States v. Sutton*, 605 F. 2d 260, vacated on other grounds, 642 F. 2d 1001, cert. denied, 453 U.S. 912, 69 L.Ed. 2d 995, 101 S.Ct. 3144 (1981). To effectuate this purpose, in part, Congress provided for a private cause action set forth at § 1964(c) which provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court
....

In order to adequately state a claim under § 1964, plaintiff must at a minimum allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," otherwise known as a "predicate act." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 87 L.Ed. 2d 346, 105 S.Ct. 3275 (1985). In addition, plaintiff must also show, and can only recover to the extent that, the injury in his business or property has been caused by the "conduct constituting the violation (of § 1962)," or the predicate act. But plaintiffs in the case *sub judice* fail to show that defendant's check-kiting scheme directly or indirectly "injured" their investments. We see no connection between defendant's stock churning activity and the defendant's two and one-half year check-kiting scheme. Plaintiffs' argument that the injury arose from the check-kiting scheme is meritless.

We find ample support for our position in a recent New York decision, *Zerman v. E. F. Hutton & Co., Inc.*, 628 F. Supp. 1509, 1512 (S.D.N.Y. 1986) where on similar facts the court stated:

[T]he allegation that Hutton engaged in an overdrafting scheme can not serve as a predicate act for plaintiff's RICO claim (based on misrepresentations regarding the purchase of securities) because there is no relation between plaintiff's claim and the check overdrafting

We therefore hold that plaintiffs have failed to state a claim for relief under 18 U.S.C. § 1964(c) and we affirm the trial court's dismissal pursuant to Rule 12(b)(6).

Affirmed as to the Rule 12(b)(6) motion.

Judges BECTON and PHILLIPS concur.

In re Arbitration between Cameron and Griffith

IN THE MATTER OF THE ARBITRATION BETWEEN: ARCHIE C. CAMERON,
CLAIMANT, AND RICHARD SHEPPARD GRIFFITH AND WIFE, ANN WEST
GRIFFITH, RESPONDENTS

No. 8712DC1246

(Filed 16 August 1988)

Arbitration and Award § 1— right to arbitration—no statute of limitations

Claimant's right to an arbitration hearing was not barred by the statute of limitations where the agreement to arbitrate did not limit the period in which arbitration could be demanded.

Judge BECTON concurring in the result.

APPEAL by respondents from *Cherry, Judge*. Judgment entered 17 August 1987 in District Court, CUMBERLAND County. Heard in the Court of Appeals 6 June 1988.

On 1 September 1978 claimant sold 1,680 shares of National Storage Company, Inc. stock to respondents for \$300,000 payable in six annual installments of \$50,000 each under a contract that provided for claimant to also receive a one-third of the proceeds obtained if respondents sold the company stock or assets or it merged with another company within six years, and for any disputes concerning the contract to be arbitrated. On 31 March 1982 National Storage Company, Inc. sold the majority of its properties to a third party for \$155,726 but none of the sale proceeds were distributed to claimant. In November of 1986 claimant demanded that respondents pay him one-third of the proceeds received from the sale of the corporate assets and upon respondents' refusal to comply therewith claimant filed a Demand for Arbitration with respect to his disputed right to the extra proceeds. At the arbitration hearing respondents objected on the grounds that the statute of limitations had run on claimant's claim and that the arbitrators had no authority to hear the claim; but the arbitrators went ahead with the hearing and on 1 June awarded claimant \$66,323, the amount sought. In due course the award was confirmed by the District Court and respondents' appeal is therefrom.

Ray Colton Vallery for claimant appellee.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins and Jeffrey N. Surles, for respondent appellants.

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PHILLIPS, Judge.

Respondents argue that their contract for the corporate stock is governed by the four-year statute of limitations provided for in G.S. 25-2-725 and the arbitration was not authorized since the claim was barred by that statute. Under the view of the appeal that we take whether the four-year statute is the correct one is irrelevant and we do not determine it; for by its terms the limitations period stated in G.S. 25-2-725 applies only to an "action," which is a "judicial proceeding," G.S. 25-1-201(1); and an arbitration is neither an "action" nor a "judicial proceeding," but a non-judicial, out-of-court proceeding which makes an action or judicial proceeding unnecessary.

The parties' contract does not limit the period in which arbitration can be demanded and no statute or court decision of this State of which we are aware does so either. Respondents' contention that it was held in *Adams v. Nelsen*, 313 N.C. 442, 329 S.E. 2d 322 (1985) that defendant's right to demand arbitration was barred because it was not filed before the three-year statute of limitations expired is mistaken; for in that case the parties' contract explicitly provided that a demand for arbitration could not be made "after the date when such dispute would be barred by the applicable statute of limitations." *Ibid.* at 447-448, 329 S.E. 2d at 325. Since the contract in this case contains no such stipulation, we conclude that the claimant's right to an arbitration hearing was not barred by the statute of limitations. Nor should it be, in our opinion; because the contract to arbitrate was freely entered into with the implied or express knowledge that arbitrators are not bound to follow the law but may decide controversies according to what is good and equitable, *Robbins v. Killebrew*, 95 N.C. 19 (1886), and that an arbitrator's mistake either as to law or fact is "the misfortune of the party." *Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 312 N.C. 224, 236, 321 S.E. 2d 872, 880 (1984). Thus, the arbitrators' mistake, if any, as to the statute of limitations was a hazard that respondents assumed when they agreed to arbitration, and we know of no authority that entitles them to be relieved thereof.

Affirmed.

Judges WELLS and BECTON concur in the result.

Ausband v. Musselwhite

Judge BECTON concurring in the result.

The powers of arbitrators are not unlimited. They, too, must follow the law. Their mistakes about the law are not ordinarily reviewable; however, their mistakes about their authority are reviewable. N.C. Gen. Stat. Sec. 1-567.13(a)(3). For example, when arbitrators fail to enforce express provisions regarding time limits, they have exceeded their authority.

Given the fact that the agreement to arbitrate in this case did not limit the period in which arbitration could be demanded, I concur in the result. As a separate basis for concurring in the result, I deem it significant that the record does not show that the respondents ever raised the defense of laches or implied waiver in any proceeding below.

FRANK C. AUSBAND, PLAINTIFF v. HERMAN S. MUSSWHITE, DEFENDANT,
THIRD PARTY PLAINTIFF v. EDWIN S. SMITH, R. D. "BILLY" MATTHEWS,
AND W. E. "GENE" TART, THIRD PARTY DEFENDANTS

No. 8721SC1203

(Filed 16 August 1988)

APPEAL by plaintiff and defendant, third party plaintiff from *Albright, Judge*. Judgment entered 9 June 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 May 1988.

The record indicates that the parties formed, or arranged for the formation, of The Matthews Company of Bahrain for the purpose of selling its stock to the public upon the State of Bahrain, an island in the Persian Gulf, approving such a sale, but such approval was never obtained. Among the myriad activities and transactions relating to this speculative venture and others the parties were interested in, only the following are pertinent to this appeal: In November 1981 The Matthews Company, which had issued great blocks of stock to some of the promoters, had neither capital nor credit of any consequence, and was far short of being either a going enterprise or qualified to sell stock to the public—

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though plans to buy a California gold mine at a cost of 200 million dollars from the sale of the company's stock had been tentatively adopted. At that time Herman Musselwhite decided to complete the promotion himself and he negotiated the purchase of Smith's 10,000 shares of stock in the company in exchange for his note in the amount of \$550,000, with the understanding that if he could not get the company approved for the public sale of its stock his note would be returned upon him returning the 10,000 shares of stock. On 2 January 1982 Smith assigned the note to R. D. Matthews, who later assigned it to plaintiff, admittedly not a holder in due course, who sued for collection. Defendant Musselwhite by his answer alleged, *inter alia*, that the conditions precedent to his liability were not fulfilled; that the note was procured by fraud; that in various ways and divers transactions, the labyrinthine details of which need not be recounted, plaintiff and third-party defendants had defrauded him and engaged in unfair trade practices; and that plaintiff and the third-party defendants, as partners in The Matthews Group, a Cayman Islands corporation, owed him \$300,000 under a note given him for services rendered.

At the close of defendant's evidence all the unfair trade practices claims were dismissed, the fraud claims as to all parties except Smith were dismissed, and the case was submitted to the jury on the issues of Musselwhite's liability on the \$550,000 note, the fraud claim against Smith, and Musselwhite's claim on the \$300,000 note. By its verdict the jury found that Musselwhite was not liable on the \$550,000 note because the conditions precedent were not fulfilled; that Smith defrauded Musselwhite in selling the stock to him but damaged him only in the amount of \$1; and that the \$300,000 note given to Musselwhite by The Matthews Group was without consideration. Judgment was entered on the verdict and both plaintiff Ausband and defendant, third-party plaintiff Musselwhite appealed.

A. Carl Penny for plaintiff appellant-appellee.

Glover & Petersen, by James R. Glover, for defendant, third-party plaintiff appellee-appellant.

Kenneth Clayton Dawson for third-party defendant appellees Edwin S. Smith and R. D. "Billy" Matthews.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins, for third-party defendant appellee W. E. "Gene" Tart.

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PHILLIPS, Judge.

Plaintiff's appeal has no merit. His principal contentions—that the issues were so ambiguous the jury did not fathom the true nature of the controversy and their answers to the issues entitled him to a judgment in his favor as a matter of law—are contradictory and without foundation. The issues sufficiently reflect the major points in controversy between the parties and nothing in the record supports the claim that the jury did not understand them or that their answers required that judgment be entered for plaintiff. His secondary contention—that the court also erred in allowing defendant to file answer past the time allowed by a previous order—is undercut by the record which shows that the court found as a fact that the extension of time involved was agreed to by plaintiff's and defendant's attorneys and no exception was taken thereto.

Defendant, third-party plaintiff Musselwhite's appeal, likewise without merit, is also overruled. His argument that the court improperly dismissed all the unfair trade practices claims refers to no evidence that would support an unfair trade practices claim against anyone; and the argument that his fraud claims against the parties other than Smith should have been submitted to the jury is answered by the fact that instead of testifying that he relied upon anyone's representations in regard to the transactions involved, he testified that he acted largely upon his own initiative and suspected that the venture was unsound. His further contention that the no consideration issue in regard to the \$300,000 note was improperly submitted to the jury is refuted by his own evidence, as well as that of the third-party defendants, to the effect that the note was given him in exchange for his promise to invest \$75,000 in The Matthews Company of Bahrain, which he never did.

No error.

Judges JOHNSON and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 AUGUST 1988

CLAYTON v. GIBSON No. 879SC1150	Person (85CVS237)	Affirmed
D.R.M., INC. v. AMERICAN AVIATION No. 8726SC931	Mecklenburg (86CVS13751)	Affirmed in part, reversed in part & remanded
HILL v. ALAMANCE COUNTY No. 8615SC1198	Alamance (86CVS912)	Vacated & remanded for further proceedings
HOLLIFIELD v. HIATT No. 8821SC184	Forsyth (87CVS1693)	Affirmed
LEWIS v. TOWN OF MORRISVILLE No. 8810SC60	Wake (87CVS2485)	Affirmed
MEANS v. BENTON No. 8812SC53	Cumberland (85CVS1185)	Affirmed
POOLE v. KING No. 8710SC752	Wake (85CVS7245)	No Error
STATE v. BERNAL No. 8712SC1224	Cumberland (86CRS33282)	No Error
STATE v. CHAPMAN No. 873SC1015	Pitt (86CRS13774) (86CRS13775)	No Error
STATE v. HUTCHENS No. 8723SC1028	Yadkin (87CRS253)	No Error

FILED 16 AUGUST 1988

CLUKEY v. MITCHELL No. 884SC164	Onslow (86CVS1662)	No Error
DOVER v. EFIRD No. 8820DC94	Union (85CVD1004)	Affirmed in part, reversed in part
HILLIARD v. HIATT No. 8710SC1257	Wake (87CVS1142)	Affirmed
LIPE v. CLEVELAND COUNTY MEDICAL EXAMINER No. 8727SC903	Cleveland (86CVS992)	Affirmed

MINER v. DICK No. 8729SC387	Polk (85SP80)	Vacated in part & remanded
PHARR v. COOPER ENTERPRISES No. 8814SC182	Durham (87CVS01145)	Dismissed
RINALDI v. M & D DEVELOPMENT CORP. No. 883DC167	Pitt (86CVD2102)	No Error
STATE v. BYRD No. 876SC965	Northampton (86CRS2079) (86CRS3066A) (86CRS2080) (86CRS3067A)	No Error

U v. Duke University

RAYMOND U v. DUKE UNIVERSITY, LEONARD R. PROSNITZ, M.D., AND MARK J. ENGLER, M.D.

No. 8714SC764

(Filed 6 September 1988)

1. Malicious Prosecution § 13.2— civil action—failure to show lack of probable cause

Plaintiff's evidence in a malicious prosecution action was insufficient to show that Duke University acted unreasonably and thus lacked probable cause to institute an action against plaintiff for conversion of a Thermotron and for a restraining order requiring plaintiff to return parts he had taken from the Thermotron.

2. Malicious Prosecution § 13— failure to show special damages

The restraint of plaintiff from entering a building owned by Duke University where a Thermotron was located did not constitute a substantial interference with plaintiff's person so as to constitute proof of special damages in a malicious prosecution action based on a prior civil proceeding.

3. Libel and Slander § 5.2— insufficient evidence of slander per quod

Plaintiff failed to show that written statements by his supervisor relating to his work constituted libel *per quod* where there was no evidence as to the meaning attached to the statements by the persons to whom they were communicated.

4. Libel and Slander § 5.2— statements relating to profession—slander per se

Statements by defendant to plaintiff's colleague that plaintiff was "a liar, deceitful, absolutely useless, and does not have a Ph.D., and was a fraud" impeached plaintiff in his profession and constituted slander *per se*.

5. Trial § 52— setting aside verdict for excessive award—discretion of court

A motion for a new trial based on excessive damages is addressed to the discretion of the trial court and is not reviewable in the absence of abuse of discretion.

6. Libel and Slander § 15— evidence of character

Evidence of the character of the plaintiff is admissible in a defamation action, and such proof may be made by testimony as to reputation or by testimony in the form of an opinion. N.C.G.S. § 8C-1, Rule 405(a).

7. Evidence § 46.1— Japanese society's perception of lawsuits—lay opinion testimony

Testimony by plaintiff's wife concerning Japanese society's perception of lawsuits was admissible under N.C.G.S. § 8C-1, Rule 701 in an action for malicious prosecution and slander.

8. Libel and Slander § 16— plaintiff's background—admission and exclusion of evidence

The trial court in a defamation action did not err in permitting plaintiff and other witnesses to testify as to plaintiff's background or in excluding a

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portion of the testimony by defendants' witnesses concerning plaintiff's background. N.C.G.S. § 8C-1, Rule 403.

9. Interest § 2; Judgments § 55— interest on damages for slander

The trial court did not err in awarding plaintiff interest on compensatory damages for slander from the date of commencement of the action where defendants failed to raise at trial the issue of non-coverage by one defendant's liability insurance. Former N.C.G.S. § 24-5.

10. Appeal and Error § 24.1— ineffectual cross-assignments of error

Plaintiff appellee's cross-assignments of error were ineffectual where they did not present an alternate basis to support the trial court's judgment but attempted to show that the trial court should have entered additional judgments in plaintiff's favor.

APPEAL by defendants from *Hobgood (Robert), Judge*. Judgment entered 29 September 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 11 April 1988.

This is a civil action wherein plaintiff seeks compensatory and punitive damages from defendants due to malicious prosecution, abuse of process, intentional infliction of emotional distress, conversion, trespass, civil conspiracy, slander and libel. Evidence presented at trial tends to show:

Plaintiff was an Assistant Professor in the Division of Radiation Biology of the Department of Radiology at Duke University Medical Center. He held a Ph.D. in radiation biology and genetics, and he had done extensive research on "hyperthermia," an experimental treatment for cancer involving heat radiation. Following visits to Japan where he met scientists interested in hyperthermia research, plaintiff approached a Japanese manufacturer to seek development of a machine for deep heating cancerous tumors. This manufacturer then developed the Thermotron RF-8 in 1981 and offered to make a unit available to plaintiff for experimentation on humans at Duke.

It was plaintiff's understanding that the loan of the Thermotron was conditioned upon his supervising and controlling use of it in all experimentation. Disagreements arose following the machine's arrival in March 1983 because many of the medical doctors believed plaintiff could not be "principal investigator" on projects involving humans since he was not a medical doctor. Plaintiff, however, believed he was the only person qualified in hyperthermia research at the time of the machine's arrival. Plain-

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tiff was subsequently approved as sole principal investigator by the Duke University Institutional Review Board and the Food and Drug Administration.

In May 1983, plaintiff was called to the office of defendant Dr. Leonard R. Prosnitz, the Director of Radiation Oncology. Defendant Prosnitz told plaintiff that he wanted to be the principal investigator on the Thermotron project. Plaintiff disagreed with defendant Prosnitz, who later wrote the Japanese manufacturer to thank him for the "gift" of the Thermotron to Duke.

Following more demands by defendant Prosnitz that he be principal investigator, plaintiff stated that unless a prior understanding among the scientists and medical doctors at Duke that plaintiff have control of the machine was honored, the manufacturer would remove the Thermotron. It was following these encounters that defendant Prosnitz began making statements concerning plaintiff's abilities, qualifications and character. Later, locks to the room where the Thermotron was kept were changed to prevent plaintiff's access to the machine.

On 2 April 1984, plaintiff gained access to the Thermotron and removed several essential parts to render the machine inoperable. The next day there was an attempt to get the parts back from plaintiff because a patient had an appointment to be treated with the machine, but plaintiff refused to return the parts because "he was the principal investigator and the machine was not to be used unless he was present and approved."

An officer from Duke's Public Safety office visited plaintiff at his Veterans Administration Hospital office. Plaintiff acknowledged having the parts but would not return them. On 4 April 1984, Duke filed a complaint for conversion and a request for a temporary restraining order alleging Duke owned the Thermotron, that it was used to treat cancer patients, and that plaintiff refused to return parts without which the machine was inoperable. A temporary restraining order requiring plaintiff to return the parts was issued, but he refused to comply.

The next day, Duke filed a "Motion to Show Cause" why plaintiff should not be held in contempt for failure to comply. Plaintiff appeared in court on 6 April, agreeing to comply with and extend the temporary restraining order. When plaintiff went

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to his Veterans Administration Hospital office to get the parts and return them, he found that someone had searched the office.

On 21 May, after the parties presented evidence at a hearing, a "consent order" was entered. The order prohibited the use of the Thermotron at Duke without prior written consent of both parties and ordered that it remain at Duke until it was returned to the manufacturer or the parties otherwise agreed in writing. All parties signed the order which was to be in effect until a final judgment was entered. On 18 July, Duke dismissed its action against plaintiff.

Plaintiff filed this action on 3 October 1984 against Duke University, Prosnitz, Dr. Mark J. Engler, and Dr. Charles E. Putnam. Engler was an Assistant Professor in the Division of Radiation Physics of the Department of Radiology. Putnam was Chairman of the Department of Radiology and supervisor of Prosnitz.

On 24 July 1986, defendants moved for summary judgment. On 13 August 1986, this motion was denied. The action came on for trial on 25 August 1986. At the close of plaintiff's evidence, the trial court granted Putnam's motion for a directed verdict on all counts. The court also granted Engler's motion for a directed verdict on all claims except civil conspiracy. Duke's motion for a directed verdict was granted on all claims except malicious prosecution and conversion.

Following presentation of all the evidence, the following issues were submitted to and answered by the jury as follows:

1. Did the defendant, Duke University, institute a civil action in the Superior Court against the plaintiff, Raymond U, with malice and without probable cause?

ANSWER: Yes

2. What amount of damages, if any, is the plaintiff, Raymond U, entitled to recover from the defendant, Duke University, for malicious prosecution?

ANSWER: \$30,000

3. What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff, Raymond U, from the defendant, Duke University, for malicious prosecution?

ANSWER: \$1,000,000

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4. Did the defendant, Leonard R. Prosnitz, by his actions, inflict severe emotional distress upon the plaintiff?

ANSWER: *No*

5. What amount of damages, if any, is the plaintiff, Raymond U, entitled to recover from the defendant, Leonard R. Prosnitz, for infliction of severe emotional distress?

ANSWER: *0*

6. What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff, Raymond U, from the defendant, Leonard R. Prosnitz, for infliction of severe emotional distress?

ANSWER: *0*

7. Did the defendant, Leonard R. Prosnitz, convert the personal property of the plaintiff on March 30, 1984?

ANSWER: *Yes*

8. Did the defendant, Duke University, convert the personal property of the plaintiff on March 30, 1984?

ANSWER: *Yes*

9. What amount of damages, if any, is the plaintiff entitled to recover from the defendant, Leonard R. Prosnitz, and/or the defendant, Duke University for conversion?

ANSWER: *\$1*

10. Did the defendant, Leonard R. Prosnitz, commit a wrongful trespass on the property in possession of the plaintiff?

ANSWER: *No*

11. What amount of damages, if any, is the plaintiff entitled to recover rm [sic] the defendant, Leonard R. Prosnitz, for trespass?

ANSWER: *0*

12. Did the defendant, Leonard R. Prosnitz, libel the plaintiff?

ANSWER: *Yes*

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13. Did the defendant, Leonard R. Prosnitz, slander the plaintiff?

ANSWER: Yes

14. What amount of damages, if any, is the plaintiff entitled to recover of the defendant, Leonard R. Prosnitz, for libel and/or slander?

ANSWER: \$50,000

15. What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff, Raymond U, from the defendant, Leonard R. Prosnitz, for libel and/or slander?

ANSWER: \$50,000

16. Was the plaintiff damaged as the result of a civil conspiracy between the defendant, Leonard R. Prosnitz, and the defendant, Mark J. Engler?

ANSWER: Yes

17. If so, what amount, if any, is the plaintiff entitled to recover of the defendants, Leonard R. Prosnitz, and Mark J. Engler, as a result of the conspiracy?

ANSWER: \$60,000

18. Was the defendant, Mark J. Engler, damaged by fraudulent misrepresentations by the plaintiff, Raymond U?

ANSWER: No

19. If so, what amount, if any, is the defendant, Mark J. Engler, entitled to recover for fraudulent misrepresentations from the plaintiff?

ANSWER: 0

20. Was the defendant, Mark J. Engler, damaged as the result of a civil conspiracy between the plaintiff and others?

ANSWER: No

21. If so, what amount, if any, is the defendant, Mark J. Engler, entitled to recover as a result of the conspiracy?

ANSWER: 0

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After the jury returned its verdict, defendants moved for judgment notwithstanding the verdict and for a new trial on 23 September 1986. On 29 September 1986, the trial court entered judgment on the verdict and the motions of defendants. Judgment notwithstanding the verdict was granted only on the civil conspiracy claims against Prosnitz and Engler.

From the judgment for plaintiff against Duke in the amount of \$30,000 in compensatory damages and \$1,000,000 in punitive damages for malicious prosecution, against Duke and Prosnitz in the amount of \$1 for conversion, and against Prosnitz in the amount of \$50,000 in compensatory damages and \$50,000 in punitive damages for libel and slander, defendants Duke University and Leonard Prosnitz appealed.

Glenn and Bentley, P.A., by Charles A. Bentley and Robert B. Glenn, Jr., for plaintiff, appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay, Theodore B. Smyth and Susan K. Burkhardt, and Fullbright & Jaworski, by Carl W. Vogt, Robert A. Burgoyne and Stephen M. McNabb, for defendant, appellants.

HEDRICK, Chief Judge.

We note at the outset that although defendants appealed from judgment awarding plaintiff \$1 and costs in his claim for conversion, no assignment of error is brought forward and argued in support of this appeal. Thus, judgment awarding plaintiff \$1 and costs is affirmed.

With respect to plaintiff's claim against defendant Duke for malicious prosecution, error is assigned to the denial of defendant's timely motions for a directed verdict and judgment notwithstanding the verdict. To recover for malicious prosecution based on all types of actions, the plaintiff must show that the defendant initiated the earlier proceeding, that he did so maliciously and without probable cause, and that the earlier proceeding terminated in the plaintiff's favor. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Additionally, in malicious prosecution cases based on underlying civil actions, the plaintiff must prove special damages. *Id.* In this case, defendant Duke contends

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plaintiff failed to show sufficient evidence of the favorable termination, lack of probable cause, and special damages.

[1] Assuming there was sufficient evidence for the jury to find favorable termination, plaintiff had to also prove defendant Duke lacked probable cause and that he incurred special damages. Defendant Duke argues that the evidence taken in a light most favorable to plaintiff is insufficient to allow a jury to find either. We agree.

Malice, as required in malicious prosecution actions, may be inferred from a lack of probable cause to institute the underlying action. *Cook v. Lanier*, 267 N.C. 166, 147 S.E. 2d 910 (1966). The standard for determining whether probable cause existed at the time an action was begun is one of reasonableness. *Fowle v. Fowle*, 263 N.C. 724, 140 S.E. 2d 398 (1965). If a reasonable person would have believed and acted under the circumstances as the defendant did, there is probable cause. *Id.*

In this case, there is not sufficient evidence that defendant Duke acted in any way other than reasonably. As employer of plaintiff and with a duty to patients scheduled for treatment with the Thermotron, defendant Duke acted reasonably in attempting to recover the parts taken by plaintiff. Although it is not clear whether either party had an exclusive right to the use and control of the property, and that there may have been other dispute settlement procedures defendant Duke could have employed, it is clear that it was reasonable for defendant Duke to employ a procedure for a quick, definite resolution since patients depended on the operation of the machine.

Plaintiff failed to prove defendant Duke acted other than reasonably and therefore failed in his proof of lack of probable cause.

[2] Even if plaintiff had shown sufficient evidence of a lack of probable cause, he also failed to show that he incurred special damages. The requirement of special damages was defined by our Supreme Court in *Stanback v. Stanback*, 297 N.C. 181, 203, 254 S.E. 2d 611, 625 (1979):

. . . when the plaintiff's claim for malicious prosecution is based on institution of a prior civil proceeding against him he must show . . . that there was some arrest of his person,

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seizure of his property, or some other element of special damage resulting from the action such as would not necessarily result in all similar cases. *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964); *Jerome v. Shaw*, 172 N.C. 862, 90 S.E. 764 (1916). The gist of such special damage is a substantial interference either with the plaintiff's person or his property. . . .

Defendant Duke argues there was no evidence of substantial interference with plaintiff's person or his property and that plaintiff therefore failed to meet his burden of proof on special damages. *Stanback* cites two cases as examples of special damages constituted by substantial interference with a plaintiff's person. In *Overton v. Combs*, 182 N.C. 4, 108 S.E. 357 (1921), the plaintiff was arrested after the defendant brought an action against him for a debt and subsequently had execution issued against the plaintiff's person. In *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223 (1955), the plaintiff was wrongfully committed to a mental institution because of the defendant's action. In each of these cases, there was a *substantial* interference with the plaintiff's person in that the person's right of movement was *totally* restricted.

In the present case, plaintiff was restricted from entering a building owned by defendant Duke because of defendant Duke's concern about the use of the Thermotron. It was not unreasonable for defendant Duke to seek such a restraint since it employed plaintiff and operated the facilities where the Thermotron was housed, and because of plaintiff's prior actions. These actions by defendant Duke at most were a slight interference with plaintiff's person. Such slight interference is not enough to cause special damages. There had to be a *substantial* interference with plaintiff's right of movement, and the evidence here is not sufficient.

Stanback further cites cases in which substantial interference with the plaintiff's property caused special damages. In *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920), the defendant caused an injunction to issue prohibiting the plaintiff's use of his property in a certain way. In *Brown v. Guaranty Estates Corp.*, 239 N.C. 595, 80 S.E. 2d 645 (1954), the defendant caused the plaintiff's property to be attached. In *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964), the defendant caused substantial interference with the

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plaintiff's property right in his license to sell real estate. Each of these cases involved a substantial interference with the plaintiff's property and not merely an interference with some right of use. In the present case, there was clearly no evidence that the property in question was owned by plaintiff. It was not his property, and therefore any interference, substantial or otherwise, could not amount to special damages. We therefore hold the trial court erred by denying defendant Duke's motions for a directed verdict or judgment notwithstanding the verdict. We need not consider any of defendant Duke's other assignments of error concerning the malicious prosecution claim. Because the trial court should have directed a verdict for defendant Duke, and no recovery could be had by plaintiff, plaintiff is likewise not entitled to punitive damages.

[3] Defendant Prosnitz contends the trial court erred by denying his motions for directed verdict or judgment notwithstanding the verdict on the issues of libel and slander. He first argues the evidence is insufficient to show that statements made were libelous.

The statements which plaintiff claimed to be libelous were as follows:

(A) "As you also probably know, Dr. U, has served as the contact person between our institution and numerous people in Japan involved in hyperthermia including yourself, Dr. Sugahara, and Mr. Yamamoto. This is a situation which I think must be changed. Our hyperthermia program has suffered from poor administration. Further, unilateral decisions have unnecessarily entangled the department in institutional and legal disputes."

(B) "In that application Dr. U listed himself as principal investigator/sponsor, again somewhat in violation of the requirements of the Duke University Committee for Clinical Investigation."

(C) "However, I believe he was [sic] consistently misinterpreted what his proper functioning should be at this point in time."

(D) "He may not assume the responsibility for the treatment of patients on this machine nor may he exercise veto powers over when and where patients are to be treated."

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(E) "the present dispute arose because Dr. U learned of our intention to do some experiments and to treat a patient and felt that such matters had to be approved by him beforehand and that he must be a participatn [sic] in any and all work done on the Thermotron RF."

(F) "That the plaintiff was an absolute fraud."

There are three classes of libel: (1) publications obviously defamatory, which are libel *per se*; (2) publications susceptible of two reasonable interpretations, one of which is defamatory and the other not; and (3) publications not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances, which are libel *per quod*. *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). The trial court, in its instructions, treated this issue as one of libel *per quod*, and we will consider the statements in light of these instructions which are not challenged by either party.

Under a libel *per quod* theory, there must be a publication or communication knowingly made by the defendant to a third person. *Taylor v. Bakery*, 234 N.C. 660, 68 S.E. 2d 313 (1951), *overruled on other grounds*, *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956). The publication must have been intended by defendant to be defamatory and had to be understood as such by those to whom it was published. *Robinson v. Insurance Co.*, 273 N.C. 391, 159 S.E. 2d 896 (1968). For these reasons, both the innuendo and special damages must be proven. *Renwick v. News and Observer* and *Renwick v. Greensboro News*, 310 N.C. 312, 312 S.E. 2d 405, *cert. denied*, 469 U.S. 858, 105 S.Ct. 187, 83 L.Ed. 2d 121 (1984). Furthermore, the trial court in this case granted defendant Prosnitz a qualified privilege since he had some duty or right as plaintiff's supervisor to communicate statements about his work. *Bouligny, Inc. v. Steelworkers*, 270 N.C. 160, 154 S.E. 2d 344 (1967). Such a qualified privilege means a publication is not actionable for libel in the absence of actual malice. *Id.*

In this case, there is sufficient evidence defendant Prosnitz made the statements and that they were communicated to third persons. Evidence that the meaning attached to the statements was defamatory, however, is lacking. None of the Japanese scientists and businessmen to whom the first five statements were made testified, and there was no other evidence of any interpreta-

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tion they made of the statements. The remaining statement was made to Dr. Putnam, who was not questioned as to how he construed the statement.

Because the evidence of defamation is insufficient, the issues of special damages and actual malice need not be addressed. Plaintiff has failed to meet his burden in showing sufficient evidence of libel by defendant Prosnitz, and the trial court erred by denying defendant Prosnitz's motions for directed verdict or judgment notwithstanding the verdict.

[4] As for plaintiff's claim for slander, defendant Prosnitz argues the "trial court erred in instructing the jury that the words allegedly spoken by the defendant Prosnitz were slander per se." For that reason, defendant Prosnitz contends the trial court erred by denying his motions for a directed verdict or judgment notwithstanding the verdict on the issue of slander.

Slander is a tort distinct from libel in that slander involves an oral communication. Like libel, slander may be *per se* or *per quod*, but it cannot fall into the intermediate category where it would be susceptible to two meanings. *Tallent v. Blake*, 57 N.C. App. 249, 291 S.E. 2d 336 (1982). Slander *per se* involves an oral communication to a third person which amounts to: (1) accusations that the plaintiff committed a crime involving moral turpitude; (2) allegations that impeach the plaintiff in his or her trade, business, or profession; or (3) imputations that the plaintiff has a loathsome disease. *Morris v. Bruney*, 78 N.C. App. 668, 338 S.E. 2d 561 (1986). Defendant Prosnitz argues that none of these circumstances were present in this case. We disagree.

The statements involved in this case were that plaintiff was "a liar, deceitful, absolutely useless, and does not have a Ph.D., and was a fraud. . ." These statements were made to Dr. Feargus O'Foghludha, a colleague of plaintiff. We hold that such statements concerning plaintiff's academic credentials amount to allegations that impeach plaintiff in his profession. As a member of Duke University's faculty and as a research scientist, plaintiff depended on his academic degree in his work. The trial court did not err by instructing the jury that such statements were slander *per se*. This argument is without merit. Therefore, the judgment awarding plaintiff \$50,000 compensatory damages and \$50,000 punitive damages on the jury's verdict finding defendant Prosnitz

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slandered plaintiff will be affirmed. Any error committed by the court with respect to plaintiff's claim for libel was harmless since the judgment awarding plaintiff \$50,000 compensatory damages and \$50,000 punitive damages is supported by the verdict in the claim for slander.

Defendants' Assignment of Error No. 57 states defendant Prosnitz's contention that the trial court erred by "failing to award a new trial to the defendant, Leonard R. Prosnitz, because of a manifest disregard by the jury of the instructions of the court, excessive damages appearing to have been given under the influence of passion or prejudice, insufficiency of the evidence to justify the verdict, and error in law occurring at trial. . . ." We have reviewed the record and find there is no evidence of a manifest disregard of the instructions by the jury.

[5] As for the contention that the jury's award of damages was excessive, a motion for a new trial based on excessive damages is addressed to the discretion of the trial court and is not reviewable in the absence of abuse of discretion. *Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E. 2d 231, *disc. rev. denied*, 301 N.C. 239, 282 S.E. 2d 135 (1980). We find no abuse of discretion in this case. The award of punitive damages is within the discretion of the jury, subject to the limitation that the amount may not be excessively disproportionate to the circumstances. *Bouligny, Inc. v. Steelworkers*, 270 N.C. 160, 154 S.E. 2d 344 (1967). We hold the award is not excessively disproportionate in this case.

Defendants' further contentions that the evidence is not sufficient to justify the verdict and that error in law occurred at trial are likewise without merit. We can find no evidence in the record to support either contention. Defendants' assignment of error is meritless.

Defendants next contend the trial court committed reversible error in several evidentiary rulings. Defendants group these rulings into five arguments, contending the trial court erred in the following ways: (1) in allowing plaintiff to offer evidence of opinion and reputation regarding his character and the character of witnesses; (2) in allowing plaintiff's wife to testify regarding Japanese society's view of lawsuits; (3) in prohibiting defendants from cross-examining a witness regarding a prior statement; (4) in permitting plaintiff and other witnesses to testify as to plaintiff's

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background; and (5) in prohibiting defendants' witnesses from testifying regarding plaintiff and his family's background. We disagree with defendants.

[6] Evidence of the "character" of a plaintiff in a defamation action is admissible. *Sowers v. Sowers*, 87 N.C. 303 (1882); Brandis on North Carolina Evidence, Sec. 103 (1982). For that reason, proof may be made by testimony as to reputation or by testimony in the form of an opinion. G.S. 8C-1, Rule 405(a). Even if testimony concerning other witnesses' character and reputation was improperly admitted, there was no prejudice such that absent the testimony the jury would have reached a different result.

[7] Plaintiff's wife's testimony as to Japanese perception of lawsuits was properly admitted under G.S. 8C-1, Rule 701. The trial court found her opinion was rationally based on her perception and was helpful to a clear understanding of her testimony. Upon reviewing the record, we agree with the trial court.

The trial court's refusal to allow cross-examination of Dr. O'Foghludha as to a previous statement also did not amount to reversible error. Defendants did not show inconsistency in his statements, and even if there were inconsistencies, this did not amount to unduly prejudicial error.

[8] Further, plaintiff's testimony as to his background and the denial of defendants' attempts to introduce evidence regarding plaintiff's background do not amount to reversible error. It is clear in this case that both plaintiff and defendants introduced evidence concerning plaintiff's character, reputation and background. While this evidence is relevant and admissible in defamation actions, some limits to the amount of evidence must apply. We cannot say the testimony of plaintiff, however, when balanced with defendants' evidence of plaintiff's background, was unduly prejudicial. Likewise, the trial court's rulings which excluded some testimony about plaintiff excluded only a small portion of the evidence presented by defendants concerning plaintiff's background. We hold the trial court properly exercised its discretion under G.S. 8C-1, Rule 403, in excluding the testimony because its probative value was substantially outweighed by a danger of unfair prejudice. Defendants' arguments on evidentiary rulings are without merit.

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[9] Defendants finally contend the trial court erred by awarding plaintiff interest on the compensatory damages awarded for slander from the date of the commencement of the action. Because this action was begun in 1984, the former G.S. 24-5 (1983 Cum. Supp.), prior to its amendment in 1985, governs. The former statute, in pertinent part, provided that "compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied. . . ." Defendants argue now for the first time on appeal that defendant Prosnitz's insurance carrier has denied coverage and that a federal district court has declared the insurance company's interpretation of the policy is correct. None of this, however, appears in the record, and because defendants failed to raise the issue at trial, they are now precluded from raising it for the first time on appeal. See *Phelps v. Duke Power Co.*, 86 N.C. App. 455, 358 S.E. 2d 89 (1987). Thus, the judgment awarding plaintiff compensatory damages for slander with interest from the date of the commencement of the action will be affirmed.

[10] Finally, plaintiff attempts to cross-assign error in the trial court granting a directed verdict on his abuse of process claim and in granting a directed verdict for defendant Prosnitz and Dr. Charles E. Putnam for malicious prosecution. Under Rule 10(d) of the North Carolina Rules of Appellate Procedure, an appellee may "set out exceptions to and cross-assign as error any action or omission of the trial court . . . which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. . . ." Plaintiff's purported cross-assignments show no alternative basis for upholding the judgment from which defendants appealed. Instead, they attempt to show that the trial court should have entered additional judgments in plaintiff's favor. Such issues can only be raised by appeal. *St. Clair v. Rakesraw*, 67 N.C. App. 602, 313 S.E. 2d 228, *rev'd in part on other grounds*, 313 N.C. 171, 326 S.E. 2d 19 (1984). Plaintiff has not appealed, and for that reason we do not consider the merits of his argument.

The result is in plaintiff's claim against defendant Duke University for malicious prosecution, judgment is reversed; in plaintiff's claim against defendant Leonard R. Prosnitz for libel and slander we find no error in the trial, and judgment will be af-

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firmed; in plaintiff's claim against defendants Duke University and Leonard R. Prosnitz for conversion, judgment will be affirmed.

All the costs incurred in this appeal will be borne one-third by plaintiff, one-third by defendant Duke University and one-third by defendant Leonard R. Prosnitz.

Affirmed in part; no error and affirmed in part; reversed in part.

Judges WELLS and COZORT concur.

TOMMIE JEAN TRUESDALE v. UNIVERSITY OF NORTH CAROLINA, WINSTON-SALEM STATE UNIVERSITY, JAMES W. LEWIS, AND ROBERT FENNING

No. 8721SC1218

(Filed 6 September 1988)

1. Pleadings § 36.2— issues not raised in pleadings—improperly considered

The trial court erred in an action arising from plaintiff's refusal to take a polygraph examination by concluding that the polygraph requirement for company police officer certification was without statutory authorization, that the proposed polygraph examination would not have met the requirements of *Warren v. City of Asheville*, 74 N.C. App. 402, and that the proposed rule violates the North Carolina Constitution where neither the complaint nor the amended complaint presented those issues and there was no trial by implied consent because the evidence supporting those contentions would also support allegations in the complaint.

2. State § 4.4— U.N.C. and W.S.S.U.—sovereign immunity applicable

Summary judgment should have been granted for the University of North Carolina and Winston-Salem State University based on sovereign immunity in an action arising from plaintiff's refusal to take a polygraph examination to be certified as a company police officer where there was no allegation or contention that plaintiff had any contract. The purpose of N.C.G.S. § 116-3 is to allow U.N.C. and its constituent institutions to sue and be sued in their own names but only as otherwise specifically provided by law.

3. State § 4.2— action against university officials

In an action arising from plaintiff's refusal to take a polygraph examination in order to be certified as a company police officer and her subsequent loss of employment as a campus security officer, the trial court erred by

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awarding monetary damages for back pay against the Vice Chancellor for Business Affairs at Winston-Salem State University and the Director of Campus Police at Winston-Salem State University in either their official or individual capacities because sovereign immunity has not been waived by statute and the Court of Appeals could not determine from the record whether or not either of the two State officials knew or should have known that plaintiff's rights as guaranteed by the United States Constitution in 42 U.S.C. Section 1983 might be violated by administering the polygraph examination.

4. Injunctions § 11— prospective injunctive relief against State officials

In an action arising from plaintiff's refusal to take a polygraph examination to become certified as a company police officer in which the trial court required plaintiff's reinstatement, plaintiff may be entitled to prospective injunctive relief in state court against defendants in their official capacities to the same extent as in federal court, where it has been held that prospective injunctive relief is the appropriate remedy in Section 1983 actions.

5. Privacy § 1; Constitutional Law § 17— polygraph as job requirement—no violation of constitutional right of privacy

In an action which arose from plaintiff's dismissal as a campus security officer following her refusal to take a polygraph examination, the trial court erred by concluding that the polygraph examination violated plaintiff's constitutional right to privacy where the control questions asked prior to administering the actual examination included questions relating to theft, prior commission of crimes, homosexual activity, sexual arousal by contact with children, unusual sex acts and anti-governmental activity. The fundamental rights entitled to protection under the right to privacy, including family relationships, marriage or procreation, bear no resemblance to the right to engage in the activities in question.

6. Constitutional Law § 74— polygraph examination as job requirement—no violation of privilege against self-incrimination

The Court of Appeals could not determine from the record whether plaintiff would have been dismissed from her employment had she appeared for a required polygraph examination and exercised her privilege against self-incrimination and the case was remanded for trial court determination of whether plaintiff would have been discharged from her employment had she appeared and exercised her privilege.

APPEAL by defendants from *Freeman (William H.), Judge*. Judgment entered 19 October 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 May 1988.

Moore & Brown, by B. Ervin Brown, II, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas J. Ziko, for defendants-appellants.

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SMITH, Judge.

Plaintiff instituted this action against Winston-Salem State University (WSSU) alleging that she was employed on 14 November 1984 as a campus security officer. The record discloses that at the time of plaintiff's employment she was informed that prior to becoming a permanent employee she would be a probationary employee for nine months and would be required to take a polygraph examination as part of the requirements for becoming certified as a company police officer. The Attorney General, through the North Carolina Criminal Justice Education and Training Standards Commission, had adopted administrative rules requiring that candidates for certification as company police officers take and successfully pass a polygraph examination. 12 N.C.A.C. .0201 *et seq.* Plaintiff was informed that if she failed to be certified as a company police officer she could still become a permanent employee if she passed the basic law enforcement officer course and was appointed a special deputy of Forsyth County. Plaintiff agreed to submit to the polygraph examination. On 29 April 1985 and 8 July 1985, plaintiff failed to appear for the scheduled polygraph examinations. She was given time off from work for the first examination. Plaintiff alleges that she refused to take the scheduled polygraph examinations after receiving information that some of the examination questions would address her sexual practices, preferences and partners. On 31 July 1985, defendant notified plaintiff that her employment would be terminated effective 13 August 1985 for insubordination arising out of her refusal to take the polygraph examination.

Plaintiff alleged in her first claim for relief that WSSU violated her rights as guaranteed by the Fifth, Ninth and Fourteenth Amendments to the United States Constitution and that defendant's actions violated 42 U.S.C. Section 1983. Plaintiff alleged in her second claim for relief that WSSU's acts constituted an unlawful attempt to administer a polygraph examination in violation of 12 N.C.A.C. .0304(a)(1). During oral argument in this Court, plaintiff's counsel abandoned this second claim for relief. Plaintiff requested reinstatement to her position with back salary and restoration of all benefits.

WSSU filed an answer which denied the material allegations of plaintiff's complaint. In addition, defendant alleged that: the

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complaint fails to state a claim upon which relief could be granted and should be dismissed pursuant to G.S. 1A-1, Rule 12(b)(6); WSSU is immune from suit under the doctrine of sovereign immunity; WSSU is not a "person" subject to suit under 42 U.S.C. Section 1983; and plaintiff's acceptance of probationary employment constituted a waiver of any rights she might have had to refuse to take the polygraph examination.

On 21 October 1986, plaintiff filed a motion for summary judgment. Thereafter, on 28 August 1987, plaintiff filed an amended complaint naming as additional defendants the University of North Carolina (UNC); Robert Fenning (Fenning), Vice Chancellor for Business Affairs at WSSU; and James W. Lewis (Lewis), Director of Campus Police at WSSU. The material allegations of the amended complaint were essentially the same as contained in plaintiff's initial complaint. Defendants filed an answer incorporating the denials and defenses alleged in the original answer. On 15 September 1987, defendants filed a motion for summary judgment. Plaintiff and defendants filed affidavits, exhibits and depositions supporting their respective motions for summary judgment. On 19 October 1987, the trial court granted plaintiff's motion for summary judgment and ordered reinstatement with back wages. In granting plaintiff's motion, the trial court concluded that: plaintiff's termination for refusal to submit to the polygraph examination violated her rights as guaranteed by the Fifth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution as well as 42 U.S.C. Section 1983; the polygraph examination failed to comply with the requirements of *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E. 2d 859, *disc. rev. denied*, 314 N.C. 336, 333 S.E. 2d 496 (1985); and the polygraph requirement for company police officer certification was without statutory authorization. Defendants appeal assigning as error the court's granting of summary judgment in plaintiff's favor in that (1) there is no constitutional prohibition against the use of the polygraph examination in conducting background investigations of prospective law enforcement officers; (2) plaintiff has alleged no claim for relief under the North Carolina Constitution; (3) plaintiff's discharge did not violate her right to privacy or her privilege against self-incrimination; (4) there is statutory authority for requiring a polygraph examination in this instance; and (5)

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the trial court had no authority to order defendants to pay plaintiff's back wages. Additionally, defendants assign error to the trial court's denial of their motion for summary judgment.

We note that the record before this Court contains no order permitting plaintiff to file her amended complaint. A plaintiff may amend a complaint once as a matter of right at any time before a responsive pleading is served. G.S. 1A-1, Rule 15(a). Thereafter, the rule requires leave of the court to file an amended complaint. Plaintiff's amended complaint was filed some thirteen months after defendants' answer was served. Though we are unable to determine from the record that the court granted leave to file the amended complaint, we choose to address the merits of this case "[t]o prevent manifest injustice." App.R. 2.

[1] We first address defendants' assignments of error to the trial court's conclusions that the rule in question was adopted without statutory authority and is thus invalid, that the proposed polygraph examination would not have met the requirements of *Warren v. City of Asheville*, and that the polygraph examination violates Article I, sec. 19 of the North Carolina Constitution. Neither the complaint nor the amended complaint present these issues. In *Moody v. Kersey*, 270 N.C. 614, 155 S.E. 2d 215 (1967), our Supreme Court held that a "plaintiff must make out [her] case *secundum allegata*. There can be no recovery except on the case made by [her] pleadings." *Id.* at 618, 155 S.E. 2d at 218 (citations omitted).

Under North Carolina's "notice theory of pleading," a trial proceeds on the issues raised by the pleadings unless the pleadings are amended. If an issue not raised by the pleadings is tried by the "implied consent" of the parties, the pleadings are deemed amended, as in a contract case in which plaintiff, without objection, presents evidence of negligence. When, however, the evidence used to support the new issue would also be relevant to support the issue raised by the pleadings, the defendant has not been put on notice of plaintiff's new or alternate theory. Therefore, defendant's failure to object does not constitute "implied consent."

Gilbert v. Thomas, 64 N.C. App. 582, 585, 307 S.E. 2d 853, 855-56 (1983) (citations omitted). In the instant case, the evidence which would support the contentions that the administrative rule was

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adopted without statutory authorization, did not meet the requirements of *Warren v. City of Asheville*, and was adopted in violation of the North Carolina Constitution would also support plaintiff's allegations that defendants' actions violated plaintiff's rights as guaranteed by the United States Constitution and 42 U.S.C. Section 1983. Thus, there was no implied consent to determine the additional issues. Those portions of the trial court's judgment concluding that the administrative rule was not authorized by statute, that the proposed polygraph examination would not meet the requirements of *Warren v. City of Asheville* and that the rule violates the North Carolina Constitution are reversed.

[2] Next we address the contention of defendants UNC and WSSU that the trial court erred in granting summary judgment for the plaintiff and failing to grant summary judgment for them for the reason that the State has not waived its sovereign immunity in actions brought pursuant to 42 U.S.C. Section 1983. A trial court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). If the pleadings and proof establish that no claim for relief exists, summary judgment is proper. *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E. 2d 2, *disc. rev. denied*, 322 N.C. 834, 371 S.E. 2d 275 (1988). In ruling on the motion, the court must consider the evidence in the light most favorable to the non-movant. *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E. 2d 39 (1986). The non-movant must be given all favorable inferences which may reasonably be drawn from the facts proffered. *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *disc. rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979); *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974). Therefore, any documents presented which support the movant's motion must be strictly scrutinized while the non-movant's papers are regarded with indulgence. *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270, *cert. denied*, 279 N.C. 619, 184 S.E. 2d 883 (1971).

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It has long been the rule in this State that the doctrine of sovereign immunity prevents the State or any of its agencies from being sued without its consent. E.g., *Insurance Co. v. Gold, Commissioner of Ins.*, 254 N.C. 168, 118 S.E. 2d 792 (1961). Plaintiff contends that G.S. 116-3 which provides in part that UNC "shall be able and capable in law to sue and be sued in all courts whatsoever" abolishes the doctrine of sovereign immunity insofar as UNC and its constituent institutions are concerned. We do not agree. The purpose and intent of G.S. 116-3 is to allow UNC and its constituent institutions to sue and be sued in their own names but only as otherwise specifically provided by law. We do not believe that the General Assembly intended to abolish the doctrine of sovereign immunity. In *MacDonald v. University of North Carolina*, 299 N.C. 457, 263 S.E. 2d 578 (1980), our Supreme Court held dismissal under the doctrine of sovereign immunity was proper in a suit on an employment contract against the University of North Carolina at Chapel Hill. The University of North Carolina at Chapel Hill and WSSU enjoy identical status under state law. G.S. 116-4. Thus, the doctrine of sovereign immunity will bar any action against UNC or WSSU.

We are aware of *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976), in which the defense of sovereign immunity was abolished in breach of contract actions. In this case, however, there is no allegation or contention that plaintiff had any contract. Thus, we conclude that the lower court erred in granting plaintiff's motion for summary judgment insofar as UNC and WSSU are concerned. Rather, we hold that summary judgment should have been granted in favor of these two defendants.

Defendants UNC and WSSU further contend that the trial court erred in granting plaintiff's motion for summary judgment against the two institutions in that they are not "persons" within the meaning of 42 U.S.C. Section 1983. In light of our ruling with regard to sovereign immunity, it is not necessary to address this contention.

[3] Next defendants assign as error the award of back pay to plaintiff. Neither the complaint nor the amended complaint indicates whether defendants Fenning and Lewis are being sued in their official capacities or individual capacities or both. The judgment of the trial court also fails to make this distinction. We

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therefore first address the issue as if the monetary award for back pay was against the two named individuals in their official capacities. Our Supreme Court has held that when an action is brought against individual officers in their official capacities, the action is one against the State for the purposes of applying the doctrine of sovereign immunity. *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E. 2d 619 (1940). We hold that there can be no award of monetary damages against a State employee in his official capacity. Such an award would, in essence, be an award against the State since it would be paid from the State treasury. We are cognizant of G.S. 143-300.6 which provides for payment by state agencies of any judgment or settlement against a state employee. However, this statute specifically states that it shall not be deemed to waive the sovereign immunity of the State. Because sovereign immunity has not been waived by the statute, there can be no monetary recovery against defendants Fenning and Lewis in their official capacities.

We next address the monetary award as if defendants Lewis and Fenning are being sued in their individual capacities. It is well established in federal courts that state officials sued in their individual capacities may be liable for monetary damages. *Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed. 2d 114, 105 S.Ct. 3099 (1985). See *Ex parte Young*, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908). Even then, however, the officials may assert the defense of qualified immunity. *Wood v. Strickland*, 420 U.S. 308, 43 L.Ed. 2d 214, 95 S.Ct. 992, *reh'g denied*, 421 U.S. 921, 43 L.Ed. 2d 790, 95 S.Ct. 1589 (1975); *Paxman v. Campbell*, 612 F. 2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1129, 67 L.Ed. 2d 117, 101 S.Ct. 951 (1981). To raise the defense, which does not apply to injunctive relief, the challenged conduct must not have violated a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed. 2d 396, 102 S.Ct. 2727 (1982).

In *Wood v. Strickland*, *supra*, the Supreme Court held that an official was not entitled to good-faith immunity "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* at 322, 43 L.Ed. 2d at 225, 95 S.Ct. at 1001.

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From the record before us, we are unable to determine whether or not either of the two state officials knew or reasonably should have known that plaintiff's rights as guaranteed by the United States Constitution and 42 U.S.C. Section 1983 might be violated by the administering of the polygraph examination. Therefore, the trial court erred in granting summary judgment and awarding back pay to plaintiff against Fenning and Lewis in their individual capacities.

[4] Next we address the trial court's granting of prospective injunctive relief against Fenning and Lewis in their official capacities. The trial court's judgment required plaintiff's reinstatement. In *Snuggs v. Stanly Co. Dept. of Public Health*, 310 N.C. 739, 314 S.E. 2d 528 (1984), the Supreme Court held that a section 1983 action could be maintained in the state courts. This Court has previously ruled that when a State employee asserts civil rights violations under section 1983 for wrongful dismissal, the court retains its traditional power to grant injunctive relief. *Williams v. Greene*, 36 N.C. App. 80, 243 S.E. 2d 156, *disc. rev. denied and appeal dismissed*, 295 N.C. 471, 246 S.E. 2d 12 (1978).

We find it helpful to review federal cases in deciding the appropriate remedy for unlawful discharge from employment. It has been held that prospective injunctive relief, in this case reinstatement, is the appropriate remedy in 1983 actions. *Quern v. Jordan*, 440 U.S. 332, 59 L.Ed. 2d 358, 99 S.Ct. 1139 (1979); *Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed. 2d 662, 94 S.Ct. 1347, *reh'g denied*, 416 U.S. 1000, 40 L.Ed. 2d 777, 94 S.Ct. 2414 (1974); *Skehan v. Bd. of Trustees of Bloomsburg State Col.*, 590 F. 2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832, 62 L.Ed. 2d 41, 100 S.Ct. 61 (1979). Ordinarily, the Eleventh Amendment would bar actions in federal court when the State is the real party in interest. An exception to this rule arises, however, when there is a constitutional attack on the official action. *Ex parte Young*, *supra*. A suit challenging the validity of a state official's actions on federal grounds is not considered an action against the state. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 79 L.Ed. 2d 67, 104 S.Ct. 900 (1984). The theory supporting this fiction is that a state may not authorize its officials to violate federal law. *Id.*; *Young*, *supra*. Even though we believe that sovereign immunity ordinarily protects the individual defendants acting in their official capacities, we hold that in section 1983 actions in which prospective injunc-

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tive relief is sought, sovereign immunity is pre-empted by federal law. *Felder v. Casey*, --- U.S. ---, --- L.Ed. 2d ---, 108 S.Ct. 2302 (1988). In *Felder*, the United States Supreme Court held that state substantive law which conflicts with the remedial objective of section 1983 and "will frequently and predictably produce different outcomes in [section] 1983 litigation based solely on whether the claim is asserted in state or federal court . . . is pre-empted." *Id.* at ---, --- L.Ed. 2d at ---, 108 S.Ct. at 2307. Therefore, we hold that plaintiff may be entitled to prospective injunctive relief in State court against defendants Fenning and Lewis in their official capacities to the same extent as in federal court.

[5] Lastly, we address the trial court's conclusion that defendants' actions in requiring the polygraph examination violated plaintiff's rights as guaranteed by the Fifth, Ninth and Fourteenth Amendments to the United States Constitution and also violated 42 U.S.C. Section 1983. In this regard, defendants assert that plaintiff has no constitutional right to refuse to take the polygraph examination. However, defendants misstate the issue. The central issues are whether the questions violate plaintiff's right to privacy and whether plaintiff can be required to surrender her privilege against self-incrimination.

The control questions which are asked prior to the administering of the actual polygraph examination include questions relating to theft, prior commission of crimes, homosexual activity, sexual arousal by contact with children, unusual sex acts and anti-governmental activity. The actual polygraph questions, which are only thirteen in number, are designed to determine if the applicant was untruthful on the application for employment or in answering the control questions.

Requiring plaintiff to answer questions regarding sexual practices, preferences and partners does not violate her constitutional right to privacy. The control questions address homosexual activity, sexual arousal by viewing children, sexual contact with minors and unusual or unnatural sex acts. There is no fundamental right to engage in homosexual activity. *Bowers v. Hardwick*, 478 U.S. 186, 92 L.Ed. 2d 140, 106 S.Ct. 2841, *reh'g denied*, --- U.S. ---, 92 L.Ed. 2d 779, 107 S.Ct. 29 (1986). The right to engage in such activities is not entitled to heightened judicial protection

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as a fundamental liberty "‘implicit in the concept of ordered liberty.’" *Id.* at 191, 92 L.Ed. 2d at 146, 106 S.Ct. at 2844, quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L.Ed. 288, 292, 58 S.Ct. 149, 152 (1937). The other sexual activities addressed by the control questions are likewise not entitled to protection as a fundamental right. The fundamental rights entitled to protection under the right to privacy, including family relationships, marriage or procreation, bear no resemblance to the right to engage in the activities in question. See *Bowers v. Hardwick*, *supra*. Thus, the trial court erred in concluding that the polygraph examination violated plaintiff's constitutional right to privacy.

[6] Next we address plaintiff's contention that the polygraph examination would have violated her privilege against self-incrimination. In the case at bar the undisputed facts show that had plaintiff attended either of the scheduled polygraph examinations she would have been asked to sign a form which states in part the following:

I fully realize that: I am not required to take this examination, I may first consult with an attorney or anyone I wish before either signing this form or taking the examination, I have the right to remain silent the entire time I am here, anything I may say can be used against me in any court of law, I have the right to talk to a lawyer for advice before answering any questions and to have him present during questioning. If I can not afford an attorney and desire one, an attorney will be appointed for me before any questioning if I wish. If I decide to answer questions now without a lawyer present, I will still have the right to stop answering at any time. I also have the right to stop answering at any time until I have talked to a lawyer, and I have the opportunity to exercise all these rights at any time I wish during the entire time I am here.

If plaintiff had been required to answer narrow and specific questions relating to performance of her duties as a security officer without being required to waive her immunity as to subsequent prosecution, there would be no violation of the privilege against self-incrimination. *Gardner v. Broderick*, 392 U.S. 273, 20 L.Ed. 2d 1082, 88 S.Ct. 1913 (1968); *Warren v. City of Asheville*, *supra*.

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The privilege against self-incrimination, limited by its terms to "any criminal case," does not prevent a governmental unit from taking non-criminal disciplinary action against an employee on the basis of compelled testimony [H]owever, . . . a governmental unit which requires an employee to make potentially incriminating statements may not burden the employee's right to exercise the privilege in a later criminal proceeding by threatening to discipline or discharge the employee if he or she refuses to waive it.

Hester v. City of Milledgeville, 777 F. 2d 1492, 1495-96 (11th Cir. 1985), *reh'g denied*, 782 F. 2d 180 (11th Cir. 1986).

However, we are unable to determine from the record before us whether plaintiff would have been dismissed from employment had she appeared for the polygraph examination and exercised her privilege against self-incrimination. For this reason, that portion of the court's order granting summary judgment and injunctive relief to plaintiff, even if against defendants Fenning and Lewis in their official capacities, must be reversed. On remand, the trial court must determine the consequences to plaintiff had she exercised her privilege against self-incrimination. We also hold that even should reinstatement be ultimately ordered, it would have to be subject to the condition that plaintiff otherwise comply with the requirements for employment which were that she pass the basic law enforcement course and be sworn in as a special deputy.

We do not believe that plaintiff is entitled to any greater relief in a section 1983 action brought in the state courts than she could obtain in federal court. The effect of this decision is to insure that plaintiff's relief, if any, will be the same that she might have in a federal court under 42 U.S.C. Section 1983. We note that in federal court the Eleventh Amendment to the United States Constitution would mandate the same result we have reached in this case. See *Quern v. Jordan*, *supra*; *Edelman v. Jordan*, *supra*; *Skehan v. Bd. of Trustees of Bloomsburg State Col.*, *supra*; *Thonen v. Jenkins*, 517 F. 2d 3 (4th Cir. 1975); *Brennan v. University of Kansas*, 451 F. 2d 1287 (10th Cir. 1971).

In summary we hold that: (1) summary judgment should have been granted for UNC and WSSU on all claims for relief; (2) the trial court must determine whether plaintiff would have been dis-

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charged from her employment had she appeared for the polygraph examination and exercised her privilege against self-incrimination; (3) monetary damages (back pay), if recovered, may only be assessed against defendants Fenning and Lewis in their individual capacities and may be subject to be defeated by the doctrine of qualified immunity; and (4) prospective injunctive relief may only be granted, if at all, against defendants Fenning and Lewis in their official capacities. Having determined that the trial court erred in granting plaintiff's motion for summary judgment, we find it unnecessary to address other contentions of the parties.

For the reasons given, the trial court is reversed.

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ELLEN JONES ROBEY AND RICHARD DALE BARNES

No. 8719SC323

(Filed 6 September 1988)

1. Criminal Law § 75.4— assertion of right to counsel — subsequent police-initiated interrogation — denial of right to counsel

Defendant's March 20 statement and March 21 confession in the absence of counsel were both products of police-initiated interrogations after defendant had asserted her right to counsel and thus were obtained in violation of her constitutional right to counsel where counsel was appointed March 4 to represent defendant on a charge of accessory after the fact to murder; the sole meeting directly initiated by defendant occurred on March 6 when defendant summoned an officer to her cell and gave him a previously handwritten statement reiterating her prior statements corroborating a confession by the victim's stepson; the police interrogated defendant in Randolph County on March 20 because the victim's stepson had recanted his confession and stated that defendant committed the murder, and defendant made certain incriminating statements; defendant was again interrogated on March 21 after being given a polygraph examination and confessed to the murder; and defendant's counsel was not present during the March 20 and 21 interrogations or notified that they would occur.

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2. Criminal Law § 11— new trial for principal—new trial for accessory after the fact also required

A defendant convicted of accessory after the fact to second degree murder is entitled to a new trial on that charge because the appellate court granted a new trial to the principal on the ground that the principal's in-custody statements were erroneously admitted where defendant and the principal were tried jointly, and the State used the same evidence to prove the principal's commission of the murder as an element of the charges against both the principal and the accessory.

3. Criminal Law § 92.2— armed robbery and accessory—two defendants—joinable offenses

The statement in *State v. Cox*, 37 N.C. App. 356, that armed robbery and accessory charges were "mutually exclusive" and thus not joinable has no application where two different defendants have been charged as principal felon and accessory after the fact.

Judge PHILLIPS concurs in the result.

APPEAL by defendants from *Allsbrook (Richard B.), Judge.* Judgment entered 16 July 1986 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 25 September 1987.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Geoffrey C. Mangum, for defendant-appellant Ellen Jones Robey.

Mary K. Nicholson for defendant-appellant Richard Dale Barnes.

GREENE, Judge.

This appeal arises from the joint trial and conviction of Ellen Robey for second-degree murder and Richard Barnes as her accessory-after-the-fact. The evidence tended to show that Thomas Robey was murdered on Christmas Eve, 1984. Based upon a confession by the victim's stepson, Michael Perdue, Perdue was originally charged with Robey's murder while Ms. Robey and Barnes were charged with being accessories-after-the-fact for allegedly helping to conceal the victim's body. Prior to the appointment of counsel, Ms. Robey made statements to police which corroborated Perdue's confession.

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Counsel was appointed for Robey on 4 March 1985. On 6 March 1985, Robey summoned a police officer to her cell and turned over a handwritten statement which reiterated her previous statements corroborating Perdue's confession. After reading Robey her *Miranda* rights, the officer accepted the written statement and the meeting ended. However, two weeks later Perdue recanted his original confession and instead made statements incriminating Robey as the murderer and characterizing himself as only an accessory-after-the-fact. The police returned to Robey's cell on March 20th, secured a waiver of her *Miranda* rights and interrogated her for almost four hours. While she continued to deny her culpability for the murder of Thomas Robey, she did make certain other incriminating statements during the interrogation on March 20th. On March 21st, she was taken to Greensboro for a polygraph examination. After continued questioning during the examination, Ms. Robey confessed to the murder of Thomas Robey.

Asserting Robey's constitutional right to remain silent and right to counsel had been violated, Robey's counsel moved to suppress the statements made on March 20th and March 21st. Based upon the testimony at the suppression hearing, the trial court concluded that Robey's incriminating statements at the Randolph County Jail on 20 March 1985 (the "March 20th statement") and at the Greensboro Police Department on 21 March 1985 (the "March 21st statement" or "confession") were both "made freely, voluntarily and intelligently." The court furthermore concluded Robey made the statements to police after a knowing and intelligent waiver of her right to remain silent and right to counsel. These conclusions were based in part on the following findings:

2. . . . that on [4 March 1985] Charles T. Browne was appointed to represent the defendant and the defendant was aware of that fact.

3. That thereafter on March 6, 1985, the defendant sent for Lieutenant Charles Ratcliffe of the Randolph County Sheriff's Department and advised that she wanted to talk with him; prior to doing so, Lieutenant Ratcliffe read to defendant her constitutional rights from a card that he held with him; and that she then handed to him a five-page statement written by her . . .

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4. That defendant Robey thereafter gave a statement on March 20, 1985 at the Randolph County Jail . . . and then gave another statement the following date on March 21, 1985 at the Greensboro Police Department.

5. That Attorney Browne was not present when either the [March 20 statement] or [March 21 confession] were [sic] taken, nor was he notified that the defendant was going to be interviewed on either of those occasions . . .

6. That although not considered necessary because of the findings of fact the court further finds that after Attorney Browne was appointed on March 4, 1985, which was known to the defendant on March 6, 1985, she sent word to Lieutenant Ratcliffe that she wanted to see him as set forth above, gave him a statement that she already had written out, *and therefore she initiated further contact and dialogue with law enforcement officers in Randolph County.* [Emphasis added.]

Robey excepted to these findings at the hearing and now asserts, among other things, that the evidence at the hearing and the court's findings of fact demonstrate her March 20th statement and subsequent confession were both products of police-initiated interrogations which violated Robey's constitutional right to counsel. Barnes also raises numerous assignments of error and contends he is entitled to a new trial if Robey's conviction is reversed.

The following issues are presented: I) whether the trial court properly found Robey's March 20th statement and March 21st confession were elicited without violating her Sixth Amendment right to counsel where the sole meeting directly initiated by Robey occurred on March 6 and resulted only in her delivering a previously written exculpatory statement to police; and II) if Robey as principal is granted a new trial of her murder charge, whether her alleged accessory-after-the-fact Barnes is also entitled to a new trial.

I

Robey's Appeal

[1] After hearing evidence at the suppression hearing, the trial court found that Robey requested the appointment of counsel on 4

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March 1985 and that the court appointed Charles Browne as Robey's counsel the same day. Once Robey requested counsel, she could not be interrogated by police without violating her federal Sixth Amendment right to counsel unless counsel was present or she subsequently waived the right to counsel previously asserted. *See Patterson v. Illinois*, --- U.S. ---, --- L.Ed. 2d ---, 108 S.Ct. 2389 (1988) (once accused "requests" counsel, post-indictment questioning forbidden unless accused calls for meeting); *Michigan v. Jackson*, 475 U.S. 625, 636, 89 L.Ed. 2d 631, 642, 106 S.Ct. 1404 (1986) (Court invalidated any waiver of counsel if police initiate interrogation after "assertion" of right at arraignment or similar proceeding); cf. *State v. Nations*, 319 N.C. 318, 324, 354 S.E. 2d 510, 513 (1987) (interpreting *Jackson* to bar further police-initiated interrogation once right to counsel "attaches"). The police must honor any limits the accused places on his waiver of counsel. E.g., *Patterson*, --- U.S. at ---, --- L.Ed. 2d at ---, 108 S.Ct. at 2395 n.5 (emphasizing accused's waiver was limited to post-indictment questioning); *Connecticut v. Barrett*, 479 U.S. 523, 93 L.Ed. 2d 920, 928, 107 S.Ct. 828 (1987) (where suspect requested counsel for written statements but agreed to talk to police, police could only use oral statements); see also *Arizona v. Roberson*, 486 U.S. ---, 100 L.Ed. 2d 704, 714-15, 108 S.Ct. 2093 (1988) (contrasting earlier opinions based on whether suspect's waiver was limited).

The State must establish any waiver of counsel by a preponderance of evidence and "[d]oubts must be resolved in favor of protecting the constitutional claim [to counsel]." *Jackson*, 475 U.S. at 633, 89 L.Ed. 2d at 640. In order to prove the accused has voluntarily waived a previous request for counsel, the State must overcome the "presump[tion] that any subsequent waiver that has come at the authorities' behest and not at the suspect's own instigation is itself the product of the 'inherently compelling pressures [of custodial interrogation]' and not the voluntary choice of the suspect." *Roberson*, 486 U.S. at ---, 100 L.Ed. 2d at 713 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467, 16 L.Ed. 2d 694, 719, 86 S.Ct. 1602 (1966)) (emphasis added). Thus, in order to show the accused has voluntarily chosen to revoke a previous request for counsel, the State must always show that the accused rather than police "initiated" the "communication, conversations or exchanges" which incriminate the accused. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L.Ed. 2d 378, 386, 101 S.Ct. 1880

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(1981). The "communication, conversations or exchanges" initiated by the accused must be more than "routine incidents of the custodial relationship" and must instead "evince . . . a willingness and a desire for a generalized discussion about the investigation . . ." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46, 77 L.Ed. 2d 405, 412, 103 S.Ct. 2830 (1983).

In addition, where incriminating statements result from police interrogation after the accused's initiation of such communication, conversations or exchanges, the State must also show under the totality of the circumstances that subsequent events indicated a waiver of the right to have counsel present during the investigation. *Bradshaw*, 462 U.S. at 1044, 77 L.Ed. 2d at 412 ("totality of circumstance" analysis where re-interrogation follows initiation); *see generally State v. Jenkins*, 311 N.C. 194, 199, 317 S.E. 2d 345, 348 (1984). However, if the trial court finds the accused did not initiate any further dialogue with authorities, the prophylactic rule applies and the confession must be excluded without reaching a consideration of the totality of the circumstances. *Jenkins*, 311 N.C. at 199, 317 S.E. 2d at 348.

Robey's brief does not challenge the finding that her written waiver of counsel was knowing and intelligent; instead, she challenges the court's necessary finding that she initiated the contact and dialogue which actually resulted in her incriminating statements on March 20th and 21st. At the outset, we note some ambiguity in the trial court's Finding No. 6 that Robey's March 6 contact with Lieutenant Ratcliffe "therefore . . . initiated further contact and dialogue with law enforcement officers in Randolph County." It is not clear whether this finding only refers to "further contact and dialogue" on March 6 or whether the court intended that it constructively encompass the police interrogations on March 20th and 21st. Furthermore, Finding No. 6 only refers to further contact and dialogue in Randolph County: Robey made her alleged confession to a Greensboro Police Department detective after interrogation in Greensboro, i.e. in Guilford County. Finding No. 6 must be viewed with some caution in any event since the court prefaced it by incorrectly stating the finding was "not necessary." Cf. *Jenkins*, 311 N.C. at 198, 317 S.E. 2d at 348 ("crucial" that the trial court find who initiated communication which results in inculpatory statement).

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We recognize the court's findings of fact are conclusive and binding if supported by competent evidence even if the record discloses conflicting evidence. *Nations*, 319 N.C. at 325, 354 S.E. 2d at 514. However, after carefully reviewing the court's findings and the transcript of the suppression hearing, we conclude there was no competent evidence from which the court could have found either Robey's March 20th statement or her March 21st confession were the products of any communication, conversations, exchanges or meetings *she* initiated which would "indicate . . . [she] felt comfortable enough with the pressures of custodial interrogation both to answer questions and to do so without an attorney." *Roberson*, 486 U.S. at ---, 100 L.Ed. 2d at 704.

The *Bradshaw* Court stated the term "initiate" should be used in its "ordinary dictionary sense" and doubted the need to "build . . . superstructures of legal refinements around the word . . ." 462 U.S. at 1045, 77 L.Ed. 2d at 412. The ordinary dictionary meaning of "initiate" is "to begin or set going; to make a beginning of; to perform or facilitate the first actions or steps of . . ." *Webster's Third New International Dictionary* at 1164 (1968). Our research has disclosed no case where a defendant's necessary initiation of conversation or meetings which lead to his incrimination has merely been inferred from such a one-sided meeting as occurred between Robey and Lieutenant Ratcliffe two weeks before officers began their interrogation. There was nothing about Robey's summoning Ratcliffe to her cell which indicated the March 6 encounter was just the "beginning" or "first step" of a generalized discussion about the investigation. Cf. *Bradshaw*, 462 U.S. at 1045, 77 L.Ed. 2d at 412 ("well, what is going to happen to me now?" sufficient to show desire for generalized discussion about investigation); *Nations*, 319 N.C. at 326, 354 S.E. 2d at 513 (accused initiated contact by telling jailer he wanted to confess and clear his conscience). In describing how he knew Robey had summoned him, Lieutenant Ratcliffe respectively testified at the suppression hearing and at trial that he merely received a message that Robey "wanted to talk to me" or that he "was wanted at the jail." Cf. *United States v. Zolp*, 659 F. Supp. 692, 719-20 (D.N.J. 1987) (accused telephoned U.S. attorney in order to "set up" a meeting which would "clear up his troubles stemming from the . . . indictment").

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Furthermore, the subsequent brief conversation between Robey and Ratcliffe did not indicate Robey's desire to participate without counsel in a dialogue with police about the investigation. Ratcliffe testified at trial that Robey initially told him she wanted to give him a written statement. Ratcliffe then read her *Miranda* warnings and the meeting terminated upon his receipt of her handwritten document. As the *Barrett* Court noted, authorities may "not ignore the tenor or sense of a defendant's response to [Miranda] warnings." *Barrett*, 479 U.S. at ---, 93 L.Ed. 2d at 927. Robey's handwritten statement only reiterated Robey's incrimination of Michael Perdue as the murderer of Thomas Robey. The written statement did not itself invite any response nor did it evidence any inquiry about the investigation. Indeed, the fact Robey wrote out her statement before summoning Ratcliffe suggests her desire *not* to engage in any face-to-face questioning by police; that Lieutenant Ratcliffe withdrew after receiving the document further supports this understanding of the meeting. Nor did anything else about the March 6th encounter suggest Robey's desire that officers return and speak to her at a later time. Cf. *Jenkins*, 311 N.C. at 200, 317 S.E. 2d at 349 (defendant asked police officer to come see him the next day: officer did not commence dialogue next day until assured defendant still wanted to talk to him).

Finding "initiation" based on such vague implications would defeat the "bright-line" prophylactic foundation of the initiation requirement. See *Jenkins*, 311 N.C. at 198, 317 S.E. 2d at 348 (noting "prophylactic" nature of requirement). Robey's initiation of the March 6th meeting, her conduct of that meeting and the statement she turned over to police show at most that she revoked her previous request to "rely on counsel as the 'medium' between [herself] and the State" only for the limited purpose of delivering her previously written exculpatory statement to a police officer. *Maine v. Moulton*, 474 U.S. 159, 176, 88 L.Ed. 2d 481, 496, 106 S.Ct. 477 (1985). Consequently, Robey's March 6th statement was undeniably a "communication" she initiated and was thus admissible.

However, the March 6 statement is not the statement the State sought to introduce at trial: the incriminating statements the State sought to introduce occurred two weeks later and were elicited only after extensive interrogation by police and a polygraph examination outside the presence of counsel. Lieutenant

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Ratcliffe testified that he had no contact with Robey during the two weeks before the March 20th interrogation. Officer House of the Randolph County Police Department testified that the police decided to interrogate Robey on March 20th because Michael Perdue had recanted his earlier confession and stated Robey committed the murder: the police thus did not return to question Robey because of any communication or conversations she had initiated but instead returned on their own initiative based on communications by Michael Perdue.

While competent evidence supports the court's finding that Robey initiated "contact" on March 6, there is no evidence to support the court's apparent inference from *that* encounter that Robey desired a subsequent generalized discussion of the investigation without her attorney—much less that she desired to be interrogated and subjected to a polygraph examination two weeks later. *Cf. State v. Jackson*, 308 N.C. 549, 582, 304 S.E. 2d 134, 152 (1983) (legal significance of finding of fact is legal determination reviewable by appellate court). Given the resolution of doubts against waiver of counsel and the clearly limited characteristics of Robey's one-sided encounter with Lieutenant Ratcliffe on March 6, we conclude Robey's statements and conduct during the March 6 encounter did not indicate she "felt comfortable enough with the pressures of custodial interrogation both to answer questions and to do so without an attorney." *Roberson*, 486 U.S. at ---, 100 L.Ed. 2d at 704.

Accordingly, as Robey's incriminating statements were the products of police-initiated interrogation without counsel, we hold the trial court erroneously denied Robey's motion to suppress her March 20th statement and her March 21st confession. The State's case against Robey was primarily based on her confession and the apparently contradictory confessions of Michael Perdue. As the evidence of Robey's guilt other than her own confession was less than "overwhelming," the admission of Robey's incriminating statements was not harmless beyond a reasonable doubt under Section 15A-1443(b). N.C.G.S. Sec. 15A-1443(b) (1983); *see State v. Brown*, 306 N.C. 151, 164, 293 S.E. 2d 569, 578 (1982) (State may overcome presumption that constitutional error is prejudicial by showing other evidence of guilt is "overwhelming"). Therefore, we hold the trial court's failure to exclude Robey's March 20th and 21st statements was prejudicial error entitling her to a new trial.

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II

Barnes's Appeal

[2] As Barnes asserts his conviction under this indictment required the jury to find the guilt of his alleged principal, Ms. Robey, Barnes contends we must grant a new trial of his accessory-after-the-fact charge if we grant a new trial for Robey. Under this particular indictment and under these particular facts, we must agree.

The State's indictment of Barnes specifically charged that Barnes became an accessory-after-the-fact to a felony committed by Robey with the knowledge that Robey had committed the felony. Under Section 14-7, the State thus had to prove three elements: (1) the specified principal (Robey) committed a felony; (2) the alleged accomplice (Barnes) personally aided Robey in her attempt to avoid criminal liability by any means calculated to assist her in doing so; and (3) Barnes gave such help with the knowledge that Robey had committed a felony. N.C.G.S. Sec. 14-7 (1986); *see State v. Fearing*, 304 N.C. 499, 504, 284 S.E. 2d 479, 483 (1981). As the State was permitted to join trial of the two offenses, it accordingly used the same evidence to prove Robey's commission of a felony as an element of both offenses. Although the jury was instructed to consider the evidence separately as to each offense, the trial court also instructed the jury that they must acquit Barnes if they acquitted Robey. Cf. *State v. Austin*, 31 N.C. App. 20, 24, 228 S.E. 2d 507, 510 (1976) (insufficient evidence of crime by named principal requires acquittal of alleged aider and abettor). As we have above held there was prejudicial error in the proof that Robey committed the felony charged, it follows that prejudicial error occurred in the proof of the same essential element of Barnes's charge under Section 14-7. *See State v. Spencer*, 18 N.C. App. 499, 197 S.E. 2d 232 (1973) (where State jointly tried murder principal and aider and abettor, prejudicial error requiring new trial of principal constituted prejudicial error requiring new trial of aider and abettor).

We recognize Section 14-7 permits the indictment and conviction of an accessory-after-the-fact "whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice . . ." Sec. 14-7. Thus, Section 14-7 has been held to permit the conviction of an accessory to a felony

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committed by an "unknown person" so long as the actions of the "unknown person" are adequately established and despite the failure to identify and convict the true principal. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). However, Section 14-7 does not permit the conviction of an accessory-after-the-fact to a felony committed by a named principal if that named principal is acquitted. Likewise, since prejudicial error during the joint trial entitles Robey to a redetermination of her guilt, Barnes must also be re-tried since the same jury necessarily considered the prejudicial evidence of Robey's alleged felony in determining that same element of Barnes's offense. Accordingly, we conclude under these facts that Robey's re-trial mandates the re-trial of Barnes.

[3] Since we grant Barnes a new trial, we need not address his numerous other assignments of error which may not arise on re-trial. However, we do note his erroneous interpretation of our opinion in *State v. Cox*, 37 N.C. App. 356, 246 S.E. 2d 152, *disc. rev. denied*, 295 N.C. 649, 248 S.E. 2d 253 (1978), *cert. denied*, 440 U.S. 930, 59 L.Ed. 2d 487 (1979). In objecting to joinder, Barnes claims his accessory charge was *per se* not joinable with Robey's second-degree murder charge based on our statement in *Cox* that the armed robbery and accessory charges in that case were "mutually exclusive" and therefore not joinable. *Id.* at 361, 246 S.E. 2d at 154. That statement is correct under the facts of *Cox* since the defendant in that case had moved under Section 15A-926(c) to dismiss accessory charges for failure to join them with an armed robbery charge of which he had previously been acquitted. Cf. N.C.G.S. Sec. 15A-976(c) (1983) (defendant tried for one offense may move to dismiss charge of joinable offense). We rejected his claim in part because one defendant cannot be charged with both a criminal offense and with being an accessory-after-the-fact to the commission of that same offense. See generally *State v. Rowe*, 81 N.C. App. 469, 471, 344 S.E. 2d 574, 576 (1986). The statement from *Cox* has no application to this case since two different defendants have been charged with two separate offenses.

New trial for both defendants.

Judge COZORT concurs.

Judge PHILLIPS concurs in the result.

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ALTON MYRICK v. JAMES OSCAR COOLEY, ANDREW F. GOODWIN, JR., PAUL DOUGLAS BARNHART, THE CITY OF GRAHAM POLICE DEPARTMENT AND CITY OF GRAHAM

No. 8715SC1041

(Filed 6 September 1988)

- 1. Constitutional Law § 17; False Imprisonment § 2.1; Arrest and Bail § 8— false arrest and false imprisonment— conviction in criminal district court— charges dismissed in superior court— directed verdicts for defendants in civil action upheld**

Directed verdict was properly granted for defendants on state and federal civil claims for false arrest and false imprisonment where plaintiff was convicted in district court of the charges for which he was arrested, even though the charges were later dismissed in superior court. Although the Court of Appeals questioned the continuing validity of the rule, established precedent compelled the conclusion that the district court conviction established the existence of probable cause for arrest as a matter of law.

- 2. False Imprisonment § 2; Arrest and Bail § 8— false arrest and false imprisonment— remarks of district court judge in criminal hearing— excluded**

In a civil action for false arrest and false imprisonment arising from plaintiff's arrest for disorderly conduct, the Court of Appeals overruled an assignment of error regarding the exclusion of evidence that the district court judge had indicated at the criminal proceeding a willingness to dismiss the charges against plaintiff if he would agree not to sue the City where plaintiff did not make an offer of proof for the record at the civil proceeding.

- 3. Assault and Battery § 3— excessive force during arrest— directed verdict for two of three officers proper**

The trial court correctly granted a directed verdict for two of three officers in a civil action for excessive force arising from plaintiff's arrest for disorderly conduct where the uncontradicted testimony established that one officer did not physically participate in the arrest, but merely looked on with his hand on his gun; and the other officer assisted by grabbing one of plaintiff's arms.

- 4. Assault and Battery § 3; Constitutional Law § 17— excessive force during arrest— directed verdict for officer proper on federal claim— improper on common law claim**

In a civil action for excessive force arising from plaintiff's arrest for disorderly conduct, the evidence against the officer primarily involved was not sufficient for a claim under 42 U.S.C. Section 1983, but was sufficient to take a common law claim of assault and battery to the jury.

- 5. Sheriffs and Constables § 4— excessive force during arrest— supervisory liability— directed verdict proper**

The trial court did not err by granting a directed verdict for the City, the police department, and the police chief in a civil action arising from plaintiff's arrest for disorderly conduct.

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Judge JOHNSON concurs in part and dissents in part.

APPEAL by plaintiff from *F. Gordon Battle, Judge*. Judgment entered 10 June 1987 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 29 March 1988.

Judith G. Behar for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice by Richard T. Rice and J. Daniel McNatt for defendant-appellees.

BECTON, Judge.

Plaintiff, Alton Myrick, brought this civil action against Graham police officers James Oscar Cooley, Andrew F. Goodwin, Jr., and Paul Douglas Barnhart; against Police Chief William Miles; and against the Graham Police Department and the City of Graham, seeking damages under the common law of North Carolina and 42 U.S.C. Sec. 1983 for claims arising from an allegedly wrongful arrest. Myrick alleged in his complaint facts tending to show that Officers Cooley, Goodwin, and Barnhart arrested him without cause and by using excessive force. He further alleged that defendant Miles knew or should have known of the three officers' propensity for violence and that the police department and the City were negligent in the hiring, training, and supervision of the officers.

The matter came on for jury trial on 10 June 1987. From a directed verdict granted in favor of all defendants at the close of the plaintiff's evidence, plaintiff appeals, assigning error to the entry of the directed verdict and to various evidentiary rulings of the trial court. We affirm in part and reverse in part.

I

Myrick presented evidence at trial which showed, in part, that on 8 October 1984, at about 9:40 p.m., he and his seventeen-year-old son, Gene, had a loud argument in the yard outside the Myrick residence during which Gene angrily banged his fist against the hood of a truck parked beside the house. Afterwards, they entered the house and all was quiet.

A few minutes later, in response to a report of a disturbance, Officers Cooley, Goodwin, and Barnhart arrived at Myrick's resi-

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dence, found no disturbance, and talked with Gene. When Myrick answered their knock at the door, they asked about the trouble. From his doorway, Myrick told them there was no disturbance other than the one they were creating and ordered them to leave his property unless they had a warrant. Then Myrick and Cooley argued loudly, with Myrick telling the officers several times to leave and Cooley threatening to arrest him if he did not get quiet.

About the third time Cooley said he was going to arrest him, Myrick responded, "Well, you go to hell," and turned to go back into the house. Thereupon, Cooley jumped on his back, threw him to the floor, jerked him up by the throat, knocked his glasses off, and pinned him against the wall. Officer Goodwin assisted Cooley in attempting to subdue and handcuff Myrick while Officer Barnhart stood nearby. Because of a painful shoulder problem, Myrick resisted efforts to cuff his hands behind his back. When told of the problem, the officers finally handcuffed him in front. Then they dragged him to the car and took him to the magistrate's office where Myrick was charged with disorderly conduct and resisting arrest and was jailed overnight. He received no injuries other than a minor cut and scratches on the nose and leg.

The parties stipulated that Myrick was convicted in District Court of disorderly conduct and resisting arrest, and that, on appeal to Superior Court, the charges were dismissed at the close of the State's evidence.

II

Myrick's primary contention is that the trial court erred by granting a directed verdict for the defendants. A defendant's motion for a directed verdict presents the question whether the evidence, considered in the light most favorable to the plaintiff, is sufficient to take the case to the jury and to support a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). The factual allegations of the complaint filed in this case are susceptible of being interpreted as stating claims under 42 U.S.C. Sec. 1983 for both false arrest and excessive use of force in effecting the arrest, and similar claims under state tort law for false imprisonment and for assault and battery. In ruling upon the propriety of the directed verdict, we must assess the sufficiency of the evidence of each of these claims with respect to each of the named defendants.

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A. False Arrest/False Imprisonment

[1] The Federal Civil Rights Act, 42 U.S.C. Sec. 1983, imposes civil liability for a deprivation, under color of state law, of rights secured by the Constitution and laws of the United States. An arrest made in violation of the fourth amendment protection against unreasonable seizures of the person will give rise to a cause of action under Section 1983, *see, e.g., Monroe v. Pape*, 365 U.S. 167, 5 L.Ed. 2d 492 (1961); *Motes v. Myers*, 810 F. 2d 1055 (11th Cir. 1987), *reh'g denied*, 837 F. 2d 1095 (1988), and under fourth amendment standards, the validity of the arrest turns upon the existence of probable cause. *Id.* *Accord Simons v. Montgomery County Police Officers*, 762 F. 2d 30 (4th Cir. 1985); *cert. denied*, 474 U.S. 1054, 88 L.Ed. 2d 767 (1986); *Street v. Surdyka*, 492 F. 2d 368 (4th Cir. 1974).

Likewise, under state law, a cause of action in tort will lie for false imprisonment, based upon the "illegal restraint of one's person against his will." *Mobley v. Broome*, 248 N.C. 54, 56, 102 S.E. 2d 407, 409 (1958). A false arrest, i.e., one without proper legal authority, is one means of committing a false imprisonment. *Id.* For purposes of a tort action under state law, the existence of legal justification for a deprivation of liberty is determined in accordance with the law of arrest, which in North Carolina is codified at N.C. Gen. Stat. Sec. 15A-401 *et seq.* (1983 and Cum. Supp. 1987). *See Hicks v. Nivens*, 210 N.C. 44, 185 S.E. 2d 469 (1936). Thus, it is possible, in some instances, for an arrest to be constitutionally valid and yet illegal under state law. *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973), *reh'g denied*, 285 N.C. 597 (1974).

However, in the present case, Myrick was subjected to a warrantless arrest for an offense allegedly committed in the presence of the arresting officers. Pursuant to N.C. Gen. Stat. Sec. 15A-401(1), such an arrest is valid if the officers had probable cause to believe he had committed a criminal offense in their presence. Hence, on the facts of this case, the standard for measuring the lawfulness of the arrest is the same for purposes of both the common law and Section 1983 claims, and in order to prevail upon either claim, Myrick must establish an absence of probable cause for the arrest.

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Although the evidence presented by Myrick concerning the circumstances of his arrest for disorderly conduct, when considered in the light most favorable to him, tends to show that he was arrested wrongfully, the trial court concluded, and we agree, that his claims for false arrest nevertheless are barred by his conviction in District Court of the charges for which he was arrested. In civil actions for malicious prosecution which, like the case at bar, require proof of want of probable cause, our appellate courts have followed the majority rule that "absent a showing that the conviction in District Court was procured by fraud or other unfair means, the conviction conclusively establishes the existence of probable cause, even though plaintiff was acquitted in Superior Court." *Falkner v. Almon*, 22 N.C. App. 643, 645, 207 S.E. 2d 388, 389 (1974). See also *Moore v. Winfield*, 207 N.C. 767, 178 S.E. 605 (1935); *Cashion v. Texas Gulf, Inc.*, 79 N.C. App. 632, 339 S.E. 2d 797 (1986); *Priddy v. Cook's United Department Store*, 17 N.C. App. 322, 194 S.E. 2d 58 (1973). Federal courts have also applied this common law principle to claims of false arrest under Section 1983. See *Cameron v. Fogarty*, 806 F. 2d 380 (2d Cir. 1986), cert. denied, 95 L.Ed. 2d 501 (1987); *Compton v. Ide*, 732 F. 2d 1429 (9th Cir. 1984).

We question the continuing validity of this rule, first pronounced in 1935, which allows a District Court judgment which is subsequently overturned upon a trial *de novo* in Superior Court to insulate the arresting officer from liability, particularly in light of our Supreme Court's 1970 pronouncement, albeit in another context, that

[w]hen an appeal of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose.

State v. Sparrow, 276 N.C. 499, 507, 173 S.E. 2d 897, 902 (1970) (emphasis added). Accord *State v. Coats*, 17 N.C. App. 407, 194 S.E. 2d 366 (1973). In addition, we are doubtful whether a judgment of the District Court which is overturned on the merits should be afforded anymore weight in these circumstances than a magistrate's independent determination of probable cause which, according to *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed. 2d 271 (1986),

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will not insulate from civil liability an officer whose application for a warrant is not objectively reasonable. Moreover, it seems incongruous to infer from a subsequent conviction the existence of probable cause for the initial arrest when it is clear that innocence of the offense charged does not establish an absence of probable cause for the arrest. See, e.g., *Baker v. McCollan*, 443 U.S. 137, 61 L.Ed. 2d 433 (1979); *Atkins v. Lanning*, 556 F. 2d 485 (10th Cir. 1977); *State v. Jeffries*, 17 N.C. App. 195, 193 S.E. 2d 388 (1972), cert. denied, 282 N.C. 673, 194 S.E. 2d 153 (1973); Prosser & Keaton, *The Law of Torts*, Sec. 119 at 880 (5th ed. 1984). Despite these doubts about the wisdom of the rule we now apply, we nevertheless are compelled by the established precedent to conclude that, in the absence of a showing that the District Court conviction of Myrick was obtained improperly, the conviction establishes, as a matter of law, the existence of probable cause for his arrest and defeats both his federal and state claims for false arrest or imprisonment.

[2] In an effort to overcome the conclusive effect of his conviction in District Court, Myrick sought to show that the conviction was "fundamentally unfair" by offering evidence at the civil proceeding that the District Court judge had indicated a willingness to dismiss the charges against him if he would agree not to sue the City. However, prior to the presentation of any evidence, the trial court granted the defendants' motion *in limine* to exclude any evidence concerning the actions or statements of the District Court judge at the criminal proceeding. In a separate assignment of error, Myrick challenges the exclusion of this evidence. We conclude that, in the absence of an offer of proof for the record, Myrick has failed to demonstrate what the excluded evidence was and how it would have shown that his conviction was "procured by fraud or other unfair means." Accordingly, the assignment of error to the exclusion of evidence is overruled, and we hold that the trial court did not err by granting a directed verdict in favor of all defendants on Myrick's Section 1983 and common law claims of false arrest and false imprisonment.

B. Excessive Force/Assault and Battery

[3] The use of unreasonable and unnecessary force to effect an arrest, even an arrest that is itself lawful, is actionable under 42 U.S.C. Sec. 1983. E.g., *Clark v. Ziedonis*, 513 F. 2d 79 (7th Cir.

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1975); *Delaney v. Dias*, 415 F. Supp. 1351 (D. Mass. 1976). See *Jenkins v. Averett*, 424 F. 2d 1228 (4th Cir. 1970) (excessive force in apprehension of suspect). Similarly, a civil action for damages for assault and battery is available at common law against one who, for the accomplishment of a legitimate purpose, such as justifiable arrest, uses force which is excessive under the given circumstances. 6 Am. Jur. 2d *Assault and Battery* Sec. 122 (1963). See *Kuykendall v. Turner*, 61 N.C. App. 638, 301 S.E. 2d 715 (1983); *Todd v. Creech*, 23 N.C. App. 537, 209 S.E. 2d 293, *cert. denied*, 286 N.C. 341, 211 S.E. 2d 216 (1974).

Under the common law, a law enforcement officer has the right, in making an arrest and securing control of an offender, to use only such force as may be reasonably necessary to overcome any resistance and properly discharge his duties. *State v. Fain*, 229 N.C. 644, 50 S.E. 2d 904 (1948); *Todd v. Creech*. “[H]e may not act maliciously in the wanton abuse of his authority or use unnecessary and excessive force.” *Id.* at 539, 209 S.E. 2d at 295; see N.C. Gen. Stat. Sec. 15A-401(d) (outlining when force may be used in effecting arrest). Although the officer has discretion, within reasonable limits, to judge the degree of force required under the circumstances, “when there is substantial evidence of unusual force, it is for the jury to decide whether the officer acted as a reasonable and prudent person or whether he acted arbitrarily and maliciously.” *Todd*, 23 N.C. App. at 539, 209 S.E. 2d at 295; *Kuykendall*, 61 N.C. App. at 644, 301 S.E. 2d at 720. Further, an assault and battery need not necessarily be perpetrated with malice, willfulness or wantonness, *Shugar v. Guill*, 51 N.C. App. 466, 475, 277 S.E. 2d 126, 133, *modified*, 304 N.C. 332, 283 S.E. 2d 507 (1981), and actual physical injury need not be shown in order to recover. Prosser and Keaton, *The Law of Torts*, Sec. 9 at 41; 6 Am. Jur. 2d, *Assault and Battery*, Sec. 5.

The threshold for determining whether the limits of privileged force have been exceeded for purposes of liability under Section 1983 is higher than that for a normal tort action, *Justice v. Dennis*, 834 F. 2d 380, 382 (4th Cir. 1987). The factors for assessing whether the use of undue force rises to constitutional dimensions include the need for the application of force, the relationship between the need and the amount of force used, and the extent of injury inflicted, 834 F. 2d at 383. A valid claim for relief exists only when the force is so excessive as to “shock the con-

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science" or appears to have been applied "maliciously and sadistically for the purpose of causing harm." *Id.*; *Bailey v. Turner*, 736 F. 2d 963, 970 (4th Cir. 1984); *Johnson v. Glick*, 481 F. 2d 1028, 1033 (2d Cir.), cert. denied *sub nom.*, *John v. Johnson*, 414 U.S. 1033, 38 L.Ed. 2d 324 (1973).

Applying the foregoing principles to the instant case, we first note that all of the evidence suggesting any undue use of force in the course of Myrick's arrest relates solely to acts of Officer Cooley. Uncontroverted testimony of multiple witnesses establishes that Officer Barnhart did not physically participate in the arrest but merely looked on with his hand on his gun. Also, with respect to Officer Goodwin's participation, the only evidence is testimony by both Myrick and Goodwin that Goodwin assisted Cooley by grabbing one of Myrick's arms. We conclude that this evidence is insufficient to support any claims against Officers Barnhart and Goodwin of excessive use of force and that the trial court properly directed a verdict in their favor with respect to all such claims.

[4] Next, we likewise conclude that a directed verdict was properly entered against Myrick on his Section 1983 claim of an unconstitutional use of excessive force by Officer Cooley. In addition to the evidence that Myrick was convicted in District Court of resisting arrest, he testified that he walked away when told he was under arrest and jerked his arm away during attempts by Cooley to cuff his hands behind his back. He also admitted on cross-examination that he "didn't intend to be [arrested]." Because the District Court conviction of Myrick on the charges for which he was arrested establishes the lawfulness of his arrest as a matter of law, it also establishes that Officer Cooley was entitled to use whatever force he reasonably believed was necessary to overcome any resistance and effect the arrest. There is no evidence in the record that Cooley used any weapon on Myrick. Moreover, the evidence shows that Myrick was handcuffed in front once the officers were told of his shoulder problem and that his injuries from the scuffle with Cooley were negligible. In our view, considering all the circumstances in light of the factors set forth by the 4th Circuit Court of Appeals in *Justice*, the facts as presented by Myrick simply do not demonstrate a use of force so unreasonably excessive as to "shock the conscience" and thereby establish a tort of constitutional proportions.

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However, we are of the opinion that the evidence, considered in the light most favorable to Myrick, is sufficient, under the lower threshold of state law, to raise a question for the jury as to whether, considering the degree of resistance offered by Myrick, Officer Cooley used an amount of force beyond that reasonably necessary to arrest and subdue him. Consequently, we hold that the issue of common law assault and battery should have gone to the jury.

C. *Supervisory Liability*

[5] Having assessed the strength of the evidence against the three arresting officers, we next consider the propriety of the directed verdict in favor of the remaining defendants. Mr. Myrick sought to impose liability on the City, its police department, and the chief of police on the basis of a departmental policy or custom of unlawful arrests, or negligence in the hiring, supervision, and training of police officers.

In separate assignments of error, Myrick contends the trial court erred by excluding certain evidence relating to two prior incidents involving Officer Cooley and to Chief Miles' personal views concerning the appropriate use of force. We deem it unnecessary to address the evidentiary arguments raised because our careful review of the record leads us to conclude that, even had this evidence been admitted, Myrick would not have established a basis for imposing liability on these defendants. The trial court did not err by directing a verdict for the City, the police department, and Chief Miles.

III

In summary, we hold that, on the basis of the evidence in this record, Myrick was entitled to have his claim against Officer Cooley for common law assault and battery submitted to the jury. With respect to all other claims for relief and all remaining defendants, the directed verdict was properly granted.

Affirmed in part and reversed in part.

Judge GREENE concurs.

Judge JOHNSON concurs in part and dissents in part.

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Judge JOHNSON concurring in part and dissenting in part.

I concur in part and dissent in part. I concur in the majority opinion except as to that portion of the holding which states that the issue of common law assault and battery should have been submitted to the jury. To this part, I respectfully dissent. Under the given circumstances of the case and considering the evidence in the light most favorable to the plaintiff I do not believe there is substantial evidence of unusual force shown in the arresting of plaintiff. Plaintiff even testified that he did not intend for the officer to arrest him. The evidence shows that the officer used such force as was necessary to properly discharge his duties and overcome plaintiff's resistance.

JAMES L. PROFFITT v. GREENSBORO NEWS & RECORD, INC., AND JOHN R. ALEXANDER

No. 8718SC792

(Filed 6 September 1988)

Libel and Slander § 16— statement about public officer in newspaper—no evidence that defendant knew statement was false or recklessly disregarded falsity

The trial court properly entered summary judgment for defendants in plaintiff's action alleging libel in an editorial published in defendant newspaper where there was no clear and convincing evidence that defendants knew it was false, or acted with reckless disregard as to whether it was false, to state that plaintiff former sheriff "lied when he initially denied having sex with" the girlfriend of a prisoner in plaintiff's custody.

APPEAL by plaintiff from *DeRamus, Judge*. Order entered 7 May 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 January 1988.

Robert S. Cahoon and Charles A. Lloyd for plaintiff appellant.

Smith Helms Mulliss & Moore by Richard W. Ellis and Alan W. Duncan for defendant appellees.

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COZORT, Judge.

Plaintiff, a former Sheriff of Guilford County, filed an action alleging libel in an editorial published in the defendant Greensboro News and Record (hereinafter "the newspaper"). The editorial stated that "Sheriff Proffitt openly lied to the public last year when he initially denied either having sex with the woman or performing favors for the inmate." The trial court granted summary judgment for defendants. We affirm.

Plaintiff was elected Sheriff of Guilford County in 1982, narrowly defeating the incumbent officeholder. In October of 1985, the defendant newspaper learned of an ongoing State Bureau of Investigation (S.B.I.) probe into charges that plaintiff and former Guilford County Assistant District Attorney Robert Johnston had in 1983 agreed to do certain favors for a Guilford County inmate, Ronnie Douglas, in exchange for sex with Ronnie's then girlfriend, Carmen Jobe. (Ronnie Douglas and Carmen Jobe had married by October of 1985, and Carmen Jobe will hereinafter be referred to as Carmen Douglas.)

Three of the newspaper's reporters interviewed plaintiff. The newspaper published a news story on 20 October 1985 stating that plaintiff "denied having sex with the woman." In the news article Johnston admitted the sexual encounter but denied he bestowed favoritism to Ronnie Douglas. Over the next month, the newspaper published several more articles repeating the statement that plaintiff denied having sex with Carmen Douglas.

In late November of 1985, plaintiff called a press conference at which he released a lengthy statement. In that statement, plaintiff did not specifically deny having sex with Carmen Douglas; however, he denied he did favors for Ronnie Douglas in exchange for sex with Carmen Douglas. On 7 December 1985, the newspaper published a news article stating that plaintiff had admitted to S.B.I. investigators that he had sex with Carmen Douglas. On 7 January 1986, plaintiff was indicted for bribery.

Plaintiff testified during his criminal trial in March of 1986. He admitted that he had sex with Carmen Douglas, but he denied the sex was in exchange for favors to Ronnie Douglas. Plaintiff was found not guilty of bribery on 26 March 1986.

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On 27 March 1986, the newspaper published an editorial entitled "Remove the Sheriff," which was written by John R. Alexander, also a named defendant in this action. This editorial calling for the removal of plaintiff as sheriff contained the following statements:

It is their elected sheriff, after all, who has abused and sullied his office. We submit that Sheriff Proffitt has violated the trust voters placed in him. . . .

. . . Incidentally, Sheriff Proffitt openly lied to the public last year when he initially denied either having sex with the woman or performing favors for the inmate.

* * * *

. . . How can they be sure he won't compromise his office again?

On 28 March 1986, counsel for plaintiff wrote to the newspaper, claiming that the language from the 27 March editorial quoted above was false, and requesting a "full and fair correction, apology and retraction." In a letter to plaintiff's counsel dated 1 April 1986, defendant Alexander denied "that there are any grounds to retract the editorial of March 27." Plaintiff then filed suit, alleging that the statements quoted above were false and defamatory. After defendants filed an answer denying any defamation, defendants moved for summary judgment. Defendants filed several affidavits and a copy of all the newspaper articles related to the allegations concerning plaintiff. Plaintiff filed an affidavit, and the 828-page transcript from plaintiff's bribery trial was filed with the trial court. The trial court granted summary judgment for defendants on 8 May 1987. Plaintiff appeals.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." After reviewing the affidavits and trial transcript filed with the trial court, and after reviewing the applicable law, we find the trial court was correct in ruling that defendants were entitled to judgment as a matter of law.

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In actions for defamation, the nature or status of the parties involved is a significant factor in determining the applicable legal standards. The parties do not dispute that the plaintiff, a former Sheriff of Guilford County, is a public official for the purposes of this action; and there is no dispute that the defendants, the Greensboro News and Record and its Editorial Page Editor, are members of the press. Thus, the basic legal standard is the rule clearly established by the United States Supreme Court more than 20 years ago:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 11 L.Ed. 2d 686, 706, 84 S.Ct. 710, 726 (1964).

When a libel action brought by a public figure is at the summary judgment stage, the appropriate question for the trial judge is whether the evidence in the record would allow a reasonable finder of fact to find either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 91 L.Ed. 2d 202, 217, 106 S.Ct. 2505, 2515 (1986).

Plaintiff contends that this statement in the 27 March 1986 editorial is defamatory: "Incidentally, Sheriff Proffitt openly lied to the public last year when he initially denied either having sex with the woman or performing favors for the inmate." Thus, to prevent summary judgment for defendants, plaintiff must forecast clear and convincing evidence that the statement in question was false, and that defendants either knew it was false or acted with reckless disregard as to the statement's truth or falsity. Upon reviewing the forecast of evidence, we find plaintiff has failed to offer clear and convincing evidence of either knowledge of falsity or careless disregard of truth or falsity.

In his brief, plaintiff contends that defendants made a false statement when they stated in the 27 March article that plaintiff "openly lied to the public last year when he denied either having

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sex with the woman or performing favors for the inmate." [sic] Plaintiff contends that the statement is false because plaintiff contends he did not deny having sex with Carmen Douglas. Instead, he argues, he had denied that he had sex with her *in exchange for favors* for Ronnie Douglas. In support of his argument that defendants knew it was false to say plaintiff had lied by denying he had sex with Carmen Douglas, plaintiff points to a 4 January 1986 editorial in the newspaper which stated: "Proffitt has consistently denied exchanging favors for sex, though he has not specifically denied having sex with the woman." This statement, plaintiff contends, is evidence that defendants knew it was false to state that plaintiff denied having sex with Carmen Douglas. We find plaintiff's argument unpersuasive.

We first note that plaintiff has failed to accurately quote the passage he claims is defamatory. The allegedly libelous statement, as originally published by the defendants on 27 March 1987, reads:

Incidentally, Sheriff Proffitt openly lied to the public last year when he *initially* denied either having sex with the woman or performing favors for the inmate. (Emphasis added.)

Plaintiff failed to include the word "initially" when he quoted the statement in his complaint, and he failed to include the word "initially" in the statement in his brief. Whether inadvertent or intentional, the omission of the word "initially" is significant, because the statement takes on a slightly different meaning when "initially" is omitted. It is important to a complete understanding of the facts that the allegedly defamatory statement be considered exactly as written.

To prevent summary judgment from being entered against him, plaintiff must forecast clear and convincing evidence that the newspaper printed a false statement when it stated that plaintiff "openly lied to the public last year when he initially denied . . . having sex with the woman . . ." If plaintiff can forecast evidence of that statement's falsity, he must then forecast clear and convincing evidence that defendants knew the statement was false, or acted with reckless disregard as to its truth or falsity.

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The first newspaper article concerning the sex-for-favor allegations appeared on 20 October 1985. It contained the following statements:

Proffitt denied having sex with the woman. . . .

* * * *

Proffitt . . . says he knows Carmen Douglas but adamantly denies having sex with her. He said he gave Ronnie Douglas no special treatment in the jail.

The newspaper repeated plaintiff's denials in an editorial published 23 October 1985. The newspaper published additional news articles repeating plaintiff's denials on 24 October and on 15 November. On 18 November 1985, the newspaper published an article stating:

Proffitt has emphatically denied having sex with Carmen Douglas. He says he provided minimal favors to Douglas in the Guilford County Jail because Douglas was an important prosecution witness in connection with several murder cases.

On 21 November 1985, the newspaper published an article stating:

Last month, Proffitt denied to reporters that he had any relationship with Carmen Douglas. Asked again today if he ever had sex with the woman, Proffitt said, "This is an allegation that Mrs. Douglas has made. I will not respond to allegations." He declined further comment.

On 22 November 1985, plaintiff held a news conference where he released a 23-paragraph statement responding to the sex-for-favor allegations. There was no language dealing specifically with whether plaintiff had sex with Carmen Douglas. The statement denied that plaintiff had done any favors in exchange for sex. Plaintiff did not answer questions at the news conference.

In an article published 7 December 1985, the newspaper reported that plaintiff had acknowledged to the S.B.I. a sexual relationship with Carmen Douglas, but that plaintiff denied providing special favors for sex. On 4 January 1986, defendants published the editorial stating that plaintiff had "not specifically denied having sex with the woman." In a column authored by

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Giles Lambertson published in the defendant newspaper on 10 January 1986, these statements appeared:

While he first denied ever having sex with the younger woman, he has since publicly retreated from outright denial. Then he declined to say one way or the other. . . .

* * * *

To SBI investigators, Proffitt reportedly has admitted an intimate relationship with Douglas. But publicly he still won't confirm or deny. This leaves his constituents to speculate whether he did or didn't.

In a news article published on 13 March 1986, the newspaper stated: "Proffitt initially denied to reporters any relationship with Carmen Douglas but has since refused to comment when specifically asked if he ever had sex with her."

At his criminal trial, plaintiff testified that he never denied to reporters for the newspaper the specific allegation of having sex with Carmen Douglas. He testified that he was always asked whether he had sex for favors and that he always denied that allegation.

Plaintiff contends that his testimony from the criminal trial and the 4 January 1986 editorial are sufficient evidence to preclude granting summary judgment for defendants. We do not agree. At most, this evidence can be viewed as *some* evidence that plaintiff did not initially deny the specific allegation of having sex with Carmen Douglas or initially deny the specific allegation of granting favors to Ronnie Douglas. It certainly cannot be viewed as *clear and convincing* evidence that defendants knew it was false, or acted with reckless disregard of the truth, when the newspaper stated that plaintiff lied when he *initially* denied either having sex with Carmen Douglas or doing favors for Ronnie Douglas. Other testimony from plaintiff's criminal trial is instructive on this point. Ed Pons, an attorney on plaintiff's staff when the allegations arose, was present when plaintiff was interviewed by the newspaper's reporters in October of 1985. At plaintiff's criminal trial in March of 1986, Pons testified:

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A. . . .

So the question about sex was posed to the sheriff during that first interview as part of a compound question relating to sex for favors.

Q. Were you present at a second interview with those individuals?

A. Yes, sir.

Q. When did the second interview take place?

A. I believe it was the day after the first interview.

Q. Who was present on that occasion?

A. On that occasion Sheriff Proffitt, myself, Stan Swafford, Mark McDonald and Ed Williams were present. Ed Williams, Mark Donald, Stan Swafford all being reporters for the *Greensboro News and Record*.

Q. Was the defendant asked at that time specifically whether or not he had had sex with Carmen Douglas?

A. Yes, sir.

* * * *

Q. . . . What was the defendant's response to that question?

A. I cannot tell you the sheriff's exact words. The sheriff said something to the effect, "I've already covered that. I've already answered those allegations. I'm not going to answer any more questions having to do with those allegations. Go to something new. Ask me something new."

Q. Was he asked what relationship, if any, he had with Carmen Douglas?

A. Yes, sir.

Q. What was his response to that question?

A. He replied with a similar response, that he had already been over that and talked about that and would not answer any new questions in that area.

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Q. Had that been asked him the day before?

A. Not to my best recollection, no, sir.

Q. Had the question whether or not he had had sex with Carmen Douglas been asked the day before?

A. Not by itself, no, sir.

Q. Was he asked what type of relationship he had with Carmen Douglas?

A. I believe he was, yes, sir.

Q. What was his response?

A. Again, I cannot give you his exact response. I know that during this interview a number of questions along these lines were put to the sheriff by Ed Williams. And to the best of my recollection, he always responded to the questions by stating that he had covered that area and would not go over it again or some other response of that nature. The sheriff never answered one of the [sic] those questions stating something to the effect: "I deny ever having sex with that girl." He never made a specific denial, but he answered the questions in such a way as to say, "I've already answered that. Let's go on to something new."

* * * *

Q. Did he ever admit during that that he had sex with Carmen Douglas?

A. No, sir, he did not.

Q. So during the interview did he ever admit having sex with Carmen Douglas?

A. No, sir, he did not.

Q. Is it your statement that he never expressly denied having sex with Carmen Douglas?

A. He never specifically and expressly denied in his own words having sex with Carmen Douglas during the second interview. He answered questions in such a way as to be ambiguous in his answers.

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Q. Did you take his answers to be that he was denying ever having sex with Carmen Douglas?

A. That is a difficult question for me to answer. At that interview—at the time of that interview he had already admitted to me having sex with Carmen Douglas, so I knew what he knew at that time. I took his answers to be evasive and sidestepping. I didn't take his answers to be a specific denial of having sex. It seemed to me that he was just really trying to avoid the question.

* * * *

Q. Was there any admission during the course of this second interview that he had sex with Carmen Douglas?

A. There was no specific admission, no, sir. Now, again I'm not trying to avoid answering your question. It was very difficult for me at that interview to be a judge of exactly what was going on. He did not specifically deny having sex with Carmen Douglas, but in the ambiguous way in which he answered Ed Williams' questions, I can see how it may have been taken as a denial.

* * * *

A. If I may repeat that again. In the ambiguous manner in which he responded to Ed Williams' questions, I can see exactly how the reporter could have taken that as a denial. If I may explain further.

Q. Yes, sir, please do.

A. In other words, when these questions were asked of him, specific questions: "What was your relationship with Carmen? Did you have sex with Carmen?" When that type of question was asked, the sheriff would respond: "I've already answered those allegations. I will not go further." And by referring to his earlier negative answer, I can see that the reporter would take that as a denial.

Q. All right, sir; and in fact in response to specific questions regarding whether or not Sheriff Proffitt had had sex with Carmen Douglas?

A. That's correct, specific questions put to him by Ed Williams.

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At most, there is a conflict in the evidence as to whether plaintiff initially denied having sex with Carmen Douglas. There is no clear and convincing evidence that defendants knew it was false, or acted with reckless disregard as to whether it was false, to state that plaintiff "lied when he initially denied having sex with Carmen Douglas." We find that the trial court's order of summary judgment should be, and is hereby,

Affirmed.

Judges PARKER and GREENE concur.

STATE OF NORTH CAROLINA v. DAROLD KEITH BENFIELD

No. 8717SC1221

(Filed 6 September 1988)

Criminal Law § 73.2; Rape and Allied Offenses § 4— taking indecent liberties with child—refusal of child to testify—admission of prior statement—failure to make necessary findings

In a prosecution of defendant for first degree sexual offense and taking indecent liberties with a child, the trial court erred in admitting into evidence a statement given by the child victim to the investigating officer without making the specific findings of fact and conclusions of law with regard to the unavailability of a witness as required by N.C.G.S. § 8C-1, Rule 804(b)(5); furthermore, such error was prejudicial and required a new trial where the only other direct evidence of the alleged incidents came from defendant's wife, whose credibility was seriously attacked, and the child's statement took on added importance as a result.

APPEAL by defendant from *Briggs, Judge*. Judgment entered 29 September 1987 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 13 April 1988.

Attorney General Lacy H. Thornburg by Assistant Attorney General William B. Ray for the State.

Daniel K. Bailey for defendant appellant.

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COZORT, Judge.

Defendant was convicted of first-degree sexual offense and taking indecent liberties with a child and was sentenced to life in prison plus five years concurrent. On appeal he contends the trial court erred by allowing a hearsay statement of the alleged victim to be introduced without first making findings of fact and conclusions of law as required by the Rules of Evidence and recent rulings by the North Carolina Supreme Court. We agree and remand for a new trial.

The State offered evidence tending to show:

In May of 1985, the defendant returned to his home in Reidsville one night intoxicated. After having sexual intercourse with his wife, he awakened his 11-year-old son and put him in bed with his wife, the child's stepmother. The defendant forced his wife to have sexual intercourse with his son and forced his wife to perform fellatio on his son. Defendant's wife testified that she tried to fake both sexual acts. She put the child's penis in her mouth, but she tried to keep from touching it with her lips and tongue. She tried to pull back to prevent penetration of her vagina when defendant forced the child to lie on top of her, but his penis slipped into her vagina about three times. Defendant's wife also testified that defendant forced her to commit sexual acts with the child when they lived in Asheboro in 1983. On that occasion, defendant displayed a pistol when he ordered his wife and son to have sexual intercourse. Defendant's wife further testified that when they were living in Asheboro, defendant had threatened her and physically abused her, including beating her with a handle from a shovel or hoe.

The child refused to testify. Over defendant's objection, the trial court allowed the State to enter into evidence a statement the child gave to investigating officers in June of 1987. The statement averred that defendant made the child and his stepmother have sex "seven or eight different times," specifically identifying the incidents in Reidsville and Asheboro. In the statement, the child averred that he and his stepmother did "those things" because they were scared of the defendant. Defendant once beat the child in the face with his fist, and the child did not "know what [defendant] might do if I don't do what he tells me."

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After verdicts of guilty and imposition of sentence, defendant appeals.

The defendant's main contention on appeal is that the trial court erred by admitting into evidence the statement given by the child to the investigating officer without making the specific findings of fact and conclusions of law pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5), as required by *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985), and *State v. Triplett*, 316 N.C. 1, 340 S.E. 2d 736 (1986). We are constrained to agree and remand the case for a new trial.

At the beginning of the trial, the State served on defendant written notice that it intended to introduce the child's statement to the officer as a hearsay exception under N.C. Gen. Stat. § 8C-1, Rule 803(24), or alternatively under Rule 804(b)(5). The trial court conducted a *voir dire* and made findings of fact. Those findings detailed the child's troubled background, his "Willie M" status, and the psychological trauma associated with the alleged incidents and the possibility of his testifying about the alleged events. The trial court did not state whether it would admit the statement under Rule 803(24) or Rule 804(b)(5). Later in the trial, the child refused to testify when he was called to the stand. The trial court questioned the child at length. The following dialogue is representative of their conversation:

COURT: Why aren't you going to testify?

WITNESS: I don't want to.

COURT: Well, it is not a question of whether you want to or don't want to. it [sic] is a question of doing what you are suppose [sic] to do. Do you know what could happen to you if you refuse to testify?

WITNESS: No, sir.

COURT: That you could be held in contempt of court, do you understand that?

WITNESS: (No answer)

COURT: Do you know what that means?

WITNESS: (Shakes head from side to side)

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COURT: It means that you are refusing to obey an order of the Court. You know that you could be punished for failing to comply with the Court's order? Do you understand what I am saying to you?

WITNESS: (Shakes head up and down)

COURT: With that understanding that you could be punished for refusing to testify are you now willing to take that stand and tell the truth?

WITNESS: I will take the stand but I am not saying anything.

....

WITNESS: The only way I will testify is to talk to you in Chambers.

....

COURT: No, you know Mrs. Broadnax don't you?

WITNESS: Yes, sir.

COURT: And you told her about it?

WITNESS: (Shakes head up and down)

....

[A]nd you talked to this Officer Hopper did you not?

WITNESS: (Shakes head up and down)

COURT: And you made statements to him?

WITNESS: (Shakes head up and down)

....

COURT: Is there a reason why you don't want to testify other than the fact that you just don't want to testify?

WITNESS: (No answer)

COURT: Have you got some reason why you don't want to testify?

WITNESS: (Long pause) I can't handle it. I can't handle it.

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COURT: Are you saying that you don't want to testify because you don't want to hurt someone?

WITNESS: (Shakes head up and down)

COURT: Is that the reason?

WITNESS: Huh, huh. (Shakes head up and down)

....

COURT: Well, I am telling you now that you could be punished if you don't testify now, do you understand that?

A. Yes.

COURT: Are you ready now to take the stand?

A. No.

COURT: Are you saying that you are not going to testify?

A. Not in court.

COURT: All right, Sheriff, you may take him out.

The State then asked for a finding that the witness was unavailable, under Rule 804. The trial court stated: "I would be inclined to allow you to introduce into evidence the statement that has been previously made. . . . I will find such facts and conclusions to support that finding at a later time."

A review of the transcript and the record reveals that the trial court never made any further findings and conclusions. The failure to make findings and conclusions, defendant contends, was error sufficient to warrant a new trial. We agree.

Rule 804(b)(5) provides:

(b) *Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * *

(5) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evi-

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dence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

In *State v. Triplett*, the North Carolina Supreme Court held:

Just as in Rule 803(24) cases, before the hearsay testimony can be admitted under Rule 804(b)(5), the trial judge must engage in the six-part inquiry prescribed in *Smith*. In Rule 804(b)(5) cases, however, the trial judge first must find that the declarant is unavailable before commencing the six-part inquiry. *United States v. Thomas*, 705 F. 2d 709 (4th Cir.), cert. denied, 464 U.S. 890 (1983) (finding of "unavailability" that proponent unable to procure attendance of declarant). The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case. For example, in the present case, the declarant is dead. The trial judge's determination of unavailability in such cases must be supported by a finding that the declarant is dead, which finding in turn must be supported by evidence of death. See, e.g., *United States v. Sindona*, 636 F. 2d 792, 804 (2d Cir. 1980). Situations involving out-of-state or ill declarants or declarants invoking their fifth amendment right against self-incrimination may require a greater degree of detail in the findings of fact. See, e.g., *Parrott v. Wilson*, 707 F. 2d 1262 (11th Cir.), cert. denied, 464 U.S. 936 (1983) (duration of illness was found to be long enough that trial could not be postponed).

Once the trial judge determines the declarant is unavailable, he must proceed with the six-part inquiry prescribed by *Smith*. A complete analysis of the requirements for each part of the *Smith* inquiry is not necessary since that case itself

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provided such analysis. However, a brief review of the requirements of *Smith* may prove helpful. First, the trial judge must determine that the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars. *State v. Smith*, 315 N.C. at 92, 337 S.E. 2d at 844. See *Furtado v. Bishop*, 604 F. 2d 80 (1st Cir. 1979), cert. denied, 444 U.S. 1035 (1980). Detailed findings of fact are not required. After the trial judge determines the notice requirement has been met, he must next determine that the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4). See *State v. Smith*, 315 N.C. at 93, 337 S.E. 2d at 844. The trial judge need only enter his conclusion in this regard in the record. The trial judge also must include in the record his findings of fact and conclusions of law that the statement possesses "equivalent circumstantial guarantee of trustworthiness." See *State v. Smith*, 315 N.C. at 93, 337 S.E. 2d at 844-45; Rule 804(b)(5). Further, the trial judge must include in the record a determination that the proffered statement is offered as evidence of a material fact. See *State v. Smith*, 315 N.C. at 94, 337 S.E. 2d at 845.

The trial judge next must consider whether the hearsay statement "is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts." N.C.G.S. 8C-1, Rule 804(b)(5). Since under the requirements of Rule 804(b)(5) the declarant must be unavailable, the necessity for use of the hearsay testimony often will be greater than in the cases involving Rule 803(24). Nevertheless, the trial judge still must make findings and conclusions regarding the hearsay's probative value. *de Mars v. Equitable Life Assurance*, 610 F. 2d 55, 61 (1st Cir. 1979). However, the inquiry in such cases may be less strenuous than in Rule 803(24) cases, since the declarant will be unavailable.

The last inquiry under Rule 804(b)(5) is whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence." N.C.G.S. 8C-1, Rule 804(b)(5). The trial judge need only state his conclusion in this regard.

State v. Triplett, 316 N.C. 1, 8-9, 340 S.E. 2d 736, 740-41 (1986).

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Under these requirements, the trial court's findings and conclusions were totally inadequate. The trial court made none of the seven findings and conclusions required under *Triplett*. As a consequence, even though the record provides an evidentiary basis from which at least some of the findings could have been made, it was error for the trial court to fail to make the specific findings and conclusions. In *Triplett*, the Supreme Court directed that the *trial judge must make the determinations* in those cases in which the trial begins after the opinion in *Triplett* was certified, which was in 1986. The appellate courts are not to comb the record on appeal to find support for the trial court's admission of hearsay in trials beginning after the certification date. *Id.* at 9-10, 340 S.E. 2d at 741. The defendant's trial herein began in September of 1987. The requirements of *Triplett* applied to the case at bar.

We next consider whether the error was prejudicial and requires a new trial. Our review of the transcript indicates that the only other direct evidence of the alleged incidents against the defendant came from defendant's wife. Defendant's wife was vigorously cross-examined about variances in earlier statements, letters to the defendant concerning possible charges against her, and letters to the defendant describing sexual acts with a young boy. In short, her credibility was seriously attacked. We believe the child's statement took on added importance as a result, and we are unable to say that its admission without making the required findings was harmless error.

Defendant argued five other assignments of error. Because of our ordering a new trial on the hearsay statement issue, we decline to discuss them here since they are not likely to arise again at defendant's new trial.

New trial.

Chief Judge HEDRICK and Judge WELLS concur.

Gentile v. Town of Kure Beach

TONY GENTILE v. TOWN OF KURE BEACH, LEE WRENN, NORRIS TEAGUE, ED JONES, LARRY WILLOUGHBY, TOM CAUSBY, AND CLARENCE ROBBINS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY

No. 875SC571

(Filed 6 September 1988)

Constitutional Law § 13.1— unqualified building inspector—negligence of town—building contractor's constitutional rights not violated

The trial court properly entered summary judgment for defendant in plaintiff building contractor's action alleging that defendant town negligently hired an unqualified building inspector whose erroneous decisions deprived plaintiff of property in violation of his rights under the Constitution and under 42 U.S.C. § 1983, since the owner of the property affected rather than a disappointed building contractor should bring an action under § 1983 challenging a building inspector's decision; plaintiff did not show that he had any other interest in property affected by the inspector's decisions, as the decisions did not result in "loss of employment"; and the building inspection process is appropriately governed by state procedures rather than by federal statutes or the U.S. Constitution.

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 9 March 1987 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 2 December 1987.

Bruce H. Robinson, Jr., for plaintiff appellant.

Marshall, Williams, Gorham & Brawley by A. Dumay Gorham, Jr. and Charles D. Meier; and Andrew A. Canoutas for defendant appellees.

COZORT, Judge.

Plaintiff filed this action alleging that the Town of Kure Beach negligently hired an unqualified building inspector whose erroneous decisions deprived plaintiff of property in violation of his rights under the Constitution and laws of the United States. Plaintiff's complaint alleged, among other things, violations of 42 U.S.C. § 1983. The trial court granted summary judgment in favor of defendants. We affirm.

Plaintiff is a building contractor. Defendant Clarence Robbins was the building inspector for defendant Town of Kure Beach from sometime prior to the spring of 1984 until 1 June 1984, when he resigned. In his complaint, plaintiff alleges that the Town,

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through the actions of defendant members of the Town Council, negligently hired, supervised, and retained Robbins, whose erroneous decisions as building inspector caused plaintiff to sustain business losses in the form of increased construction costs and lost profits. Plaintiff filed a civil complaint against the Town, Robbins, and members of the Town Council, individually and in their official capacities, alleging deprivation of rights secured by the federal and state constitutions, violation of 42 U.S.C. § 1983, and malicious interference with contract. After filing an answer denying plaintiff's allegations and after conducting discovery, defendants moved for summary judgment. The motion was granted in defendants' favor.

On appeal, plaintiff argues only that the trial court erred in its summary judgment ruling on the liability of the Town under 42 U.S.C. § 1983. Rule 28 of the Rules of Appellate Procedure provides that questions not presented and discussed in a party's brief are deemed abandoned. Rule 28(a), N.C. Rules App. Proc.; *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). Therefore, only the issue of the Town's liability under § 1983 is before us.

A motion for summary judgment should be allowed and is looked upon with favor when the evidence reveals that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56; *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Upon examining the pleadings, depositions, and other discovery materials, together with the affidavits filed in support of defendants' motion, see *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974), and drawing all inferences in favor of plaintiff, *id.*, we conclude that the trial court was correct in holding that the Town was entitled to a judgment as a matter of law.

Section 1983 of Title 42 of the U.S. Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

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liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

Two elements must be proved in order for a plaintiff to recover under § 1983: (1) that defendant has deprived plaintiff of a right secured by the Constitution and laws of the United States, and (2) that defendant has acted under color of law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 26 L.Ed. 2d 142, 90 S.Ct. 1598 (1970); *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F. 2d 1524, 1526-27 (1st Cir. 1983), citing *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L.Ed. 2d 420, 101 S.Ct. 1908, 1912 (1981). We find plaintiff has failed to forecast evidence sufficient to establish the first element.

Municipalities are "persons" under § 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L.Ed. 2d 611, 98 S.Ct. 2018 (1978). However, a municipality is not liable simply because it employs a tortfeasor. *Id.* Rather, it is directly liable for its actions in implementation of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690, 56 L.Ed. 2d at 635, 98 S.Ct. at 2035-36. Plaintiff contends that the Town had a policy of negligently hiring, retaining, and supervising its building inspector, who was unqualified and whose decisions deprived plaintiff of constitutionally protected property interests. Even if plaintiff could prove that the Town's single, allegedly negligent hiring error amounted to a "policy," plaintiff's action must fail.

Section 1983 creates no substantive rights in and of itself; rather, it is a vehicle for enforcing federally protected rights derived from other sources. *Irby v. Sullivan*, 737 F. 2d 1418, 1727 (5th Cir. 1984). It appears that plaintiff seeks to invoke his rights under the Fourteenth Amendment, specifically the clause providing that a state shall not deprive any person of property without due process of law. U.S. Const. Amend. XIV. Property interests protected by the Fourteenth Amendment, and hence by § 1983, are created and defined by other sources, such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L.Ed. 2d 548, 561, 92 S.Ct. 2701, 2709 (1972).

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N.C. Gen. Stat. § 160A-388 sets forth the statutory scheme by which an individual may challenge decisions of building inspectors. Section (b) of N.C. Gen. Stat. § 160A-388 provides:

The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city.

In *Pigford v. Board of Adjustment*, 49 N.C. App. 181, 270 S.E. 2d 535 (1980), *disc. rev. denied and app. dismissed*, 301 N.C. 722, 274 S.E. 2d 230 (1981), this Court dismissed the complaint because petitioner did not allege that she was the owner of the property affected by the building inspector's decision. Therefore, the owner of the property affected, not a disappointed building contractor, has an interest protected under the North Carolina statute.

Federal courts have likewise required that the owner of the property bring an action under § 1983 challenging a building inspector's decision. See *Sternngass v. Bowman*, 563 F. Supp. 456 (S.D.N.Y.), *aff'd mem.*, 742 F. 2d 1440 (2d Cir. 1983), *cert. denied*, 469 U.S. 823, 105 S.Ct. 100, 83 L.Ed. 2d 45 (1984); *Eaton v. City of Solon*, 598 F. Supp. 1505 (N.D. Ohio 1984). In *Sternngass*, a sole shareholder of a corporate owner of property, which was the site of a proposed housing project, brought a § 1983 action against a town, the town board, and the building inspector. In dismissing plaintiff's complaint for lack of standing, the court ruled, in part, that, "if the inspections violated the law, the rights infringed were those of the property owners, and not the Sternngasses'." *Sternngass*, 563 F. Supp. at 460. See also *Eaton*, 598 F. Supp. at 1524.

Plaintiff stated in his deposition that he was not the owner of any of the property that was the subject of an inspection decision rendered by Robbins. Therefore, the building inspector's decisions did not affect a property interest belonging to plaintiff as defined by state law.

Nor has plaintiff come forward with any evidence that decisions made by the building inspector affected any other property in which he had an interest cognizable under § 1983. Exhibits at-

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tached to plaintiff's complaint present five instances in which plaintiff allegedly suffered a "loss of employment." The first instance, involving the construction of a porch for a mobile home, took place, according to the complaint and plaintiff's deposed testimony, in May of 1982. His complaint was filed on 21 June 1985, more than three years later. The statute of limitations applicable in § 1983 actions is the State's statute governing personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed. 2d 254, 105 S.Ct. 1938 (1985). North Carolina law provides a three-year statute of limitations for personal injury actions. N.C. Gen. Stat. § 1-52. Therefore, plaintiff's claim is barred with respect to the May 1982 "loss of employment."

Two other instances of "loss of employment" involved Robbins' decisions concerning the property owners' applications for building permits. In one instance, Robbins denied an application for a permit to build a motel. The owner of the property at issue appealed Robbins' decision, pursuant to N.C. Gen. Stat. § 160A-388; both the Board of Adjustment and the New Hanover County Superior Court upheld the rejection. This Court, in an unpublished decision, *Bodenhamer v. Town of Kure Beach*, 70 N.C. App. 494, 320 S.E. 2d 441 (1984), affirmed. In the other instance, Robbins issued a permit for a motel, which plaintiff then constructed for the property owners. Plaintiff alleges that Robbins erroneously required him to include a firewall in the structure. The property owner, however, never appealed that requirement. As discussed above, the property interest affected by Robbins' decision was that of the owner, who had a statutory appeal remedy. Absent a successful appeal, plaintiff, as contractor, was required to comply with the Town's construction standards.

The two remaining allegations of "loss of employment" involved construction contracts that plaintiff allegedly lost because of his difficulties with Robbins. In his deposition plaintiff stated that one of these potential projects "never came off—for what reason, I don't know." Plaintiff also admitted that the project was never built because the owner "ran into sewer problems." Defendants' unchallenged affidavits from the present and former building inspectors for the Town show that no building permit was ever applied for or discussed. As for the other project, the construction of an addition to a local motel, plaintiff contends that he lost the bid to construct the project because Robbins erroneously

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informed him that a firewall would be required, which caused plaintiff to submit a high bid and lose the job. The owners stated in affidavits submitted by defendants that they secured bids only because their banker requested that they do so in order to determine the cost of their project. They further stated that they never intended to hire plaintiff or any other general contractor, having planned to subcontract the project themselves. Thus, as to these latter two instances of "loss of employment," plaintiff had nothing more than a mere expectation that he would be awarded the contracts, which is insufficient to establish a property interest protected by the U. S. Constitution or § 1983. As the U. S. Supreme Court has stated, plaintiff must have more than a "unilateral expectation" of a property interest; he must have a "legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. at 577, 33 L.Ed. 2d at 561, 92 S.Ct. at 2709.

In addition, not all violations of state law arise to the level of a constitutional tort. *Paul v. Davis*, 424 U.S. 693, 700, 47 L.Ed. 2d 405, 413, 96 S.Ct. 1155, 1160 (1976). Plaintiff has cited no authority for the proposition that the reach of § 1983 should extend to cover allegations that a building inspector's erroneous decisions amount to the taking of property without due process. To the contrary, as the First Circuit has noted, "the conventional planning dispute—at least when not tainted with fundamental procedural irregularity, racial animus, or the like—which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution." *Creative Environments, Inc. v. Estabrook*, 680 F. 2d 822, 833 (1st Cir.), cert. denied, 459 U.S. 989, 74 L.Ed. 2d 385, 103 S.Ct. 345 (1982). The First Circuit has utilized this reasoning to deny redress under § 1983 to a property owner whose application was determined to have been erroneously denied, resulting in a five-year delay in the project. See *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F. 2d 1524 (1st Cir. 1983). See also *Chongris v. Board of Appeals*, 811 F. 2d 36 (1st Cir. 1987), cert. denied, --- U.S. ---, 97 L.Ed. 2d 765, 107 S.Ct. 3266 (1987), and *Crocker v. Hakes*, 616 F. 2d 237 (5th Cir. 1980), holding that state procedures through which building inspector decisions may be appealed satisfy the demands of the Fourteenth Amendment. Plaintiff, a building contractor disappointed by the decisions of the Town's building inspector, has no greater rights than the

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owner of the realty that is the subject of the building inspector's decision.

For the foregoing reasons, the trial court's entry of summary judgment for the defendants is

Affirmed.

Judges BECTON and EAGLES concur.

IN THE MATTER OF: NATHAN TEAGUE, JR.

No. 8727DC1233

(Filed 6 September 1988)

1. Infants § 10— extradition proceedings—required findings of fact

The required findings in adult and juvenile extradition proceedings are not the same; rather, N.C.G.S. § 7A-689 requires findings of fact that the requisition from the requesting state is in order and that the name and age of the delinquent juvenile on such requisition are the same as the juvenile before the court. Further, nothing in N.C.G.S. § 7A-689 allows the court to return a juvenile to the demanding state only upon a finding that such return is in the best interest of the juvenile, since such an inquiry is reserved for the requisitioning state.

2. Constitutional Law § 28; Infants § 10— extradition of juveniles—constitutionality of statute—equal protection and due process not denied

Because N.C.G.S. § 7A-689 allowing for extradition of juveniles applies uniformly to all juveniles who have escaped or absconded from other state jurisdictions which are members of the Interstate Compact on Juveniles, and a juvenile appearing in a proceeding under the statute has already received a best interest determination by the demanding state, the statute does not deny respondent equal protection and due process under the N. C. and U. S. Constitutions.

Judge GREENE concurring in the result.

APPEAL by respondent from *Langson, Judge*. Order entered 24 September 1987 in District Court Juvenile Session, GASTON County. Heard in the Court of Appeals 11 May 1988.

On 28 August 1987 a fugitive warrant was issued for respondent alleging his escape from confinement in South Carolina. Respondent was subsequently taken into custody by the Gastonia

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City Police. On 9 September 1987 this warrant was dismissed because respondent is a juvenile and an adult warrant is therefore invalid. Respondent was released on that date into his father's custody in Gaston County. Judge Langson further ordered that South Carolina forward the appropriate paperwork pursuant to the Interstate Compact on Juveniles, N.C.G.S. § 7A-684 *et seq.* by 24 September 1987 or the matter would be dismissed.

South Carolina forwarded a Requisition for Escape or Absconder and an Adjudication Order to Gaston County, finding respondent guilty of burglary, malicious damage to real property, and contempt of court under the laws of South Carolina. The requisition further stated that respondent was an escapee from the custody and control of the South Carolina Department of Youth Services.

At the 24 September 1987 hearing, the trial court ordered the juvenile turned over to the appropriate South Carolina authorities, stayed the order pending appeal and ordered respondent into his father's custody.

From the order that he be returned to South Carolina, respondent appeals.

Public Defender Rowell C. Cloninger, Jr., by Assistant Public Defender Joseph F. Lyles, for respondent-appellant.

Attorney General Lacy H. Thornburg, by Associate Attorney General T. Lane Mallonee, for the State.

ORR, Judge.

Respondent's brief does not refer to assignments of error and exceptions pertinent to the question nor does it contain a statement of the questions for review. These are technical violations of Rules 28(b)(2) and 28(b)(5) of the North Carolina Rules of Appellate Procedure, which subject this appeal to dismissal. *State v. Shelton*, 53 N.C. App. 632, 281 S.E. 2d 684 (1981), *appeal dismissed and disc. rev. denied*, 305 N.C. 306, 290 S.E. 2d 707 (1982). However, because this is an important case of first impression in this state and to prevent any injustice to respondent, we will consider respondent's appeal and suspend the requirements of Rule 28(b) as authorized by Appellate Rule 2.

In re Teague

I.

Respondent first contends that the trial court erred in ordering his return to South Carolina without first making findings of fact and conclusions of law in its order. We agree.

N.C.G.S. § 7A-684 *et seq.* comprises the North Carolina Interstate Compact on Juveniles. The purpose of such Compact is to encourage cooperation among the states which are Compact members.

In carrying out the provisions of this Compact the party states shall be guided by the noncriminal, reformative, and protective policies which guide their laws concerning delinquent, neglected, or dependent juveniles generally. It shall be the policy of the states party to this Compact to cooperate and observe their respective responsibilities for the prompt return and acceptance of juveniles and delinquent juveniles who become subject to the provisions of this Compact.

N.C.G.S. § 7A-685 (1986).

The Compact requirements for the return of juvenile escapees and absconders is found in N.C.G.S. § 7A-689. Subsection (a) of this statute sets forth the requirements in the case *sub judice*.

That the appropriate person or authority from whose probation or parole supervision a delinquent juvenile has absconded or from whose institutional custody he has escaped shall present to the appropriate court or to the executive authority of the state where the delinquent juvenile is alleged to be located a written requisition for the return of such delinquent juvenile. Such requisition shall state the name and age of the delinquent juvenile, the particulars of his adjudication as a delinquent juvenile, the circumstances of the breach of the terms of his probation or parole or of his escape from an institution or agency vested with his legal custody or supervision, and the location of such delinquent juvenile, if known, at the time the requisition is made. The requisition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the judgment, formal adjudication, or order of commitment which subjects such delinquent juvenile to probation or

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parole or to the legal custody of the institution or agency concerned. Such further affidavits and documents as may be deemed proper may be submitted with such requisition. . . . Upon the receipt of a requisition demanding the return of a delinquent juvenile who has absconded or escaped, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing him to take into custody and detain such delinquent juvenile. Such detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No delinquent juvenile detained upon such order shall be delivered over to the officer whom the appropriate person or authority demanding him shall have appointed to receive him, unless he shall first be taken forthwith before a judge of an appropriate court in the state, who shall inform him of the demand made for his return and who may appoint counsel or guardian ad litem for him. If the judge of such court shall find that the requisition is in order, he shall deliver such delinquent juvenile over to the officer whom the appropriate person or authority demanding him shall have appointed to receive him. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Interpretation of this statute is a matter of first impression. Respondent argues that the trial court should have made the following findings of fact under this statute.

- 1) a finding that the respondent meets the definition of 'delinquent juvenile' contained in G.S. § 7A-687,
- 2) a finding that the juvenile is the juvenile sought by a state demanding his return,
- 3) a finding that the juvenile is alleged to have escaped or be a runaway as defined by the law of the demanding state,
- 4) a finding that the paperwork filed by the demanding state is in order, and
- 5) that the juvenile has fled the demanding state.

The State argues that the above findings are implicit in finding that "the requisition is in order" under N.C.G.S. § 7A-689.

[1] Respondent's requested findings mirror the required findings in an adult extradition proceeding. N.C.G.S. §§ 15A-730 and 743 (1983). We disagree with respondent that the findings in adult and

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juvenile proceedings should be the same and decline to enter a lengthy discussion on the policy and purpose of treating juveniles differently from adults under the law. We agree, however, that N.C.G.S. § 7A-689 requires some findings of fact to protect a juvenile in this state from being improperly returned to the demanding state.

First, N.C.G.S. § 7A-689 clearly requires a finding that "the requisition is in order." For this finding the trial court must review the requisition to ensure that it states "the name and age of the delinquent juvenile, the particulars of his adjudication . . . , the circumstances of the breach of the terms of his . . . escape from an institution or agency vested with his legal custody or supervision, and the location of such delinquent juvenile" N.C.G.S. § 7A-689(a) (1986). Implicit in reviewing the requisition for name and age is a determination that the juvenile sought by the state requesting his return is the same juvenile as the one before the court. Here, such determination was mandatory. Although this issue was not raised by respondent, his birthdate (age) on the requisition from South Carolina is different from his birthdate on all court records in this state. While this may be an obvious clerical error, in other cases it may not be so obvious.

By this requirement we do not imply that N.C.G.S. § 7A-689 mandates verification of birth. We find that the statute requires the trial court to make an inquiry establishing that the juvenile before the court is the same person sought by the requesting state. Here, the trial court's inquiry was insufficient.

THE COURT: Stayed out of trouble?

RESPONDENT: Yes, sir.

THE COURT: The records say you ran away from South Carolina equivalent of training school, huh?

RESPONDENT: Yes, sir.

By finding that the name and age of the juvenile in the requisition is correct, the trial court has implicitly found that the juvenile comes under the jurisdiction of the juvenile court. Therefore, we hold that N.C.G.S. § 7A-689 requires findings of fact that the requisition from the requesting state is in order and that the name and age of the delinquent juvenile on such requisition is the

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same as the juvenile before the court. Any other findings regarding the requisition would be redundant and are not mandatory under the statute. Upon the above findings, the juvenile court may then conclude and order the juvenile returned to the demanding state.

We further hold that nothing in N.C.G.S. § 7A-689 allows the court to return a juvenile to the demanding state only upon finding that such return is in the best interest of the juvenile. We agree with the court in *In Interest of C. P.*, 533 A. 2d 1001 (Pa. 1987) that "such an inquiry [into the child's best interests] was reserved for the requisitioning state." 533 A. 2d at 1002. There, the juvenile was a runaway who was returned to her father's custody in North Carolina. The court said that under the Pennsylvania runaway statute (which is similar to N.C.G.S. § 7A-689) when the "judge . . . find[s] that the *requisition is in order, he shall deliver such juvenile . . .*" *Id.* at 1003 (emphasis supplied). There is nothing in our statute that allows any other action by the juvenile court but to deliver the juvenile (to the appropriate authorities) upon appropriate findings.

II.

[2] Respondent also contends that N.C.G.S. § 7A-689 denies him equal protection and due process under the United States and North Carolina Constitutions because it allows no inquiry into the juvenile's best interests. We find no merit to this argument and hold that N.C.G.S. § 7A-689 is constitutional.

It is well established that state laws which protect juveniles are justified by the state's *parens patriae* relationship to juveniles. *In re Walker*, 282 N.C. 28, 191 S.E. 2d 702 (1972). When a classification is based on differences reasonably related to the purposes of the act, then the classification does not violate the Equal Protection Clause. *Id.*

N.C.G.S. § 7A-689 is part of the Interstate Compact on Juveniles. By its definition it applies uniformly and exclusively to juveniles. Therefore, respondent cannot and should not be treated the same as an adult in an extradition proceeding. Further, the statute is applied equally to all juveniles. It does not allow a court to make a best interest determination for some juveniles but not for others. "The constitutional equal protection safeguard re-

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quires that the line drawn be a rational one, and that there be nondiscriminatory application of the law within the class established." *In the Interest of Storm*, 223 N.W. 2d 170, 173 (Iowa 1974) (citation omitted).

In *Storm*, the respondent juvenile made the same constitutional arguments as the respondent in the case *sub judice*. There, the Iowa court held the Interstate Compact statute for return of escaped or runaway juveniles to be constitutionally sound on equal protection grounds.

We hold that because N.C.G.S. § 7A-689 applies uniformly to all juveniles who have escaped or absconded from other state jurisdictions which are Compact members, there has been no violation of equal protection of the law.

Further, N.C.G.S. § 7A-689 does not violate the respondent's right to due process. A juvenile has never been afforded the same spectrum of procedural rights as adults. *In Interest of C. J. W.*, 377 So. 2d 22 (Fla. 1979). The sole procedure allowed under the statute is for the court to return the child to the demanding jurisdiction upon certain findings. When the statutory criteria are met, the court "shall deliver such delinquent juvenile over to the officer . . . appointed to receive him." N.C.G.S. § 7A-689(a) (1986).

We can rightly assume that by the time a juvenile is before a court in a proceeding under N.C.G.S. § 7A-689, he has received a best interest determination by the demanding state. We find that in a proceeding of this nature that the demanding state is the one in the better position to make the best interest determination. It would be redundant as well as contrary to the statute to conduct another best interest determination.

For the reasons set forth above, we hold N.C.G.S. § 7A-689 to be constitutional. We vacate and remand, however, for findings of fact and conclusions consistent with part I of the opinion.

Vacated and remanded.

Judge ARNOLD concurs.

Judge GREENE concurs in the result.

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Judge GREENE concurring in the result.

While I agree that Section 7A-689 requires findings concerning the requisition's correctness and the juvenile's identity, I otherwise concur only in the majority's result. I do note the finding that the requisition is "in order" must not be taken lightly. In order to be complete, a requisition under Section 7A-689 must include:

. . . the name and age of the delinquent juvenile, the particulars of his adjudication as a delinquent juvenile, the circumstances of the breach of the terms of his probation or parole or of his escape from an institution or agency vested with his legal custody or supervision, and the location of such delinquent juvenile, if known, at the time the requisition is made. The requisition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the judgment, formal adjudication, or order of commitment which subjects such delinquent juvenile to probation or parole or to the legal custody of the institution or agency concerned.

The court's finding must thus be based on evidence in the record that the requisition conforms in all respects to these requirements.

STATE OF NORTH CAROLINA v. RICHARD A. STURKIE

No. 8727SC1099

(Filed 6 September 1988)

1. Searches and Seizures § 13— warrantless search of outbuilding—consent given by owner—evidence admissible

The trial court did not err in allowing into evidence property obtained as a result of a warrantless search of an outbuilding which defendant had been given permission to use for storage purposes where defendant's sister was the owner of the outbuilding, had extensive use and control thereof, and voluntarily gave consent to its search and seizure of items therein.

2. Searches and Seizures § 26— warrantless search—tip from confidential informant—informer not proven reliable—insufficient showing of probable cause

The trial court erred in allowing into evidence property seized without a warrant from an outbuilding owned by defendant's sister where officers acted

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on the basis of a tip from a confidential informant whose reliability had not been established; the officers did not know at the time of the seizure that a crime had been committed; and the officers had no knowledge that the goods were contraband.

APPEAL by defendant from *Kirby, Judge*. Judgment entered 14 July 1987 in Superior Court, GASTON County. Heard in the Court of Appeals 31 March 1988.

Defendant was tried and convicted upon an indictment proper in form charging him with felonious possession of stolen goods. From judgment imposing an active sentence of five years, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General L. Darlene Graham, for the State.

Frank Patton Cooke, by Malcolm B. McSpadden, for defendant-appellant.

JOHNSON, Judge.

The State presented evidence tending to show the following.

The Gaston County Police Department received information from a previously unknown confidential informant that Rocky Moore, Drew Phillips, and defendant Richard Sturkie "were doing break-ins" using a yellow vehicle. The informant also told the police that Moore and defendant were selling the stolen merchandise at the Exxon station at Hickory Grove Road and Four Points. After receiving this information, the police established a surveillance team to follow them and to monitor activity at the Exxon station.

W. A. Jeter, investigator for the Gaston County Police Department, testified that he was a member of the surveillance team assigned to watch a vehicle and three individuals, one of whom was defendant. On 23 October 1986, he saw defendant and Rocky Moore traveling together in a yellow car, which belonged to Teresa Sturkie, defendant's wife. Detective Jeter, who maintained radio contact with the other members of the team, followed the car to the Exxon station on Hickory Grove Road. He observed defendant take a chain saw from the trunk, crank it up, and apparently display it to two persons at the service station.

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He also observed defendant and Moore take two chain saws, a bow and arrow, and something wrapped in a canvas sack into the rear of the service station. Defendant and Moore then left in the car for a short period of time. Upon their return, they loaded the chain saws and other materials in the car. Next, they left in the car and drove into Mecklenburg County and proceeded to the residence of Kathy Baxter, defendant's sister. Thereafter, defendant and Moore were observed taking items out of the yellow car and placing them into an outbuilding on Kathy Baxter's property.

Mrs. Baxter was contacted by the police and was brought to her residence. The police informed her of her rights and requested permission to search the outbuilding. She informed the police that defendant had called her and requested if he could use the outbuilding to store some items. She informed the police that she had given defendant permission to store some items in the building and that defendant probably had the key. The building was locked with a key-type padlock. Mrs. Baxter gave her consent to search the building and signed a printed form. They were unable to locate the key so the police removed the lock with bolt cutters.

A search of the outbuilding revealed five long rifles, which were wrapped in a brown cloth wrapping, chain saws, a bow and arrows along with some lawn chairs, a lawn mower and similar outdoor items. The items referenced in the indictment were found in the outbuilding, and Mrs. Baxter was told that the property may have been stolen. Some of the items were later determined to be the property of a Mrs. Norville. At the time of the search, there were no police reports in existence concerning a burglary of the home of Mrs. Norville nor was there any description of property alleged to be missing or stolen from her home. The police did not seek or obtain defendant's permission to search the outbuilding.

Mrs. Baxter testified on voir dire examination that although she allowed defendant to store some of the property in the outbuilding, various items of property belonging to her and her family were also kept in that outbuilding. She further testified that she purchased the outbuilding; that she felt free to go in and out the outbuilding as she chose; that defendant paid no rent for the

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use of the outbuilding and that there was no agreement that defendant was to have exclusive use of the outbuilding.

Defendant's evidence tended to show the following.

Rocky Moore testified that he was in possession of the property in question after he had stolen it from the Norville residence, and that he approached defendant and asked him if he could store property that he owned without indicating to defendant that the property was stolen. Defendant was unable to store it at his house, but after asking his sister, Kathy Baxter, he was able to store it for Moore in her outbuilding.

[1] In his first Assignment of Error, defendant contends that the trial court erred in allowing into evidence property obtained as a result of a warrantless search, to which the owner consented, of an outbuilding which defendant had been given permission to use for storage purposes. We cannot agree.

A person may consent to a search of premises he or she jointly uses or occupies with another, and evidence found pursuant to such a search may constitutionally be used against that other if the person giving consent to the search has rights of use or occupation at least equal to those of the other. *State v. Melvin*, 32 N.C. App. 772, 233 S.E. 2d 636 (1977). Furthermore, G.S. sec. 15A-222 allows a law enforcement officer to conduct a search and make seizures without a warrant if voluntary consent is given by a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to search the premises.

Defendant asserts that he had the exclusive right to use the outbuilding and therefore Mrs. Baxter had no authority to consent to a search. At best, defendant had joint use of the outbuilding with Mrs. Baxter. In the case *sub judice*, evidence was presented, and findings of fact consistent therewith were made, to the effect that Mrs. Baxter was the person with extensive use and control of the outbuilding searched and that she voluntarily gave consent to a search of the outbuilding and to a seizure of the items within. The evidence adduced at voir dire therefore supported the court's findings of fact. This assignment of error is without merit.

[2] In his second Assignment of Error, defendant contends that the trial court erred in allowing into evidence property seized by

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police without foreknowledge that it was stolen, that a crime had been committed, and that the property was contraband, in violation of his constitutional rights. We agree.

Whether a seizure is reasonable, and therefore constitutional, is to be determined upon the facts giving rise to the individual case. *State v. Beaver*, 37 N.C. App. 513, 246 S.E. 2d 535 (1978). A seizure of an item in plain view is constitutionally permissible if the officer making the seizure *has probable cause to believe that the object seized constitutes contraband or evidence of a crime*. *State v. Howard*, 56 N.C. App. 41, 286 S.E. 2d 853 (1982). Furthermore, "[a] good faith belief is not enough to constitute probable cause, unless the faith is [']grounded on facts within knowledge of the [officer][.] which, in the judgment of the court, would make his faith reasonable.'" *Beaver*, at 518, 246 S.E. 2d at 539, quoting, *Carroll v. United States*, 267 U.S. 132, 161-62, 69 L.Ed. 543, 555, 45 S.Ct. 280, 288 (1925).

The evidence reveals that the officers received information from a confidential informant that defendant, Rocky Moore, and Drew Phillips were involved in break-ins and larcenies, and that these individuals were selling stolen items at an Exxon station. However, this confidential informant had not been proven reliable because this was the first instance when the police had received information from him. Based upon this information, the officers conducted surveillance of the individuals and observed them at the Exxon station. On one occasion they observed defendant and Rocky Moore displaying to someone a chain saw which they had retrieved out of defendant's wife's car. On another occasion they observed defendant and Rocky Moore counting cash and dividing money.

The evidence further reveals that the officers followed defendant and Rocky Moore to Mrs. Baxter's residence and observed them place certain items in her outbuilding. In addition, the officers had information that Rocky Moore had an extensive criminal record. At the time the officers searched the outbuilding and seized the goods, they had no concrete information that the goods were in fact stolen. The officers learned that the goods were stolen one week after they had been seized. The initial basis upon which the officers relied to perform the search and seizure was the informant's tip.

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Critical to any constitutional validity of warrantless seizures is the reliability of the information from the informant. In the context of a search conducted pursuant to a warrant, *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527, 103 S.Ct. 2317 (1983), established that in determining probable cause in actions involving informants, a "totality of the circumstances" approach would now be utilized. The *Gates* opinion overrules the more rigid two-pronged test established by *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964) and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969), which required affidavits supporting a warrant to demonstrate (1) the basis of the informant's knowledge and (2) past reliability of the informant.

In *State v. Tickle*, 37 N.C. App. 416, 246 S.E. 2d 34 (1978), officers conducted a warrantless search of a defendant's car and seized contraband based on a tip by an informant who had not previously supplied reliable information. Defendant alleged that information from a previously unknown informant was not sufficient to constitute probable cause of a warrantless search of an automobile unless the informant also relates facts which show that he is reliable and his information dependable. This Court held that the officer had reasonable grounds to believe that defendant was carrying contraband in his automobile when confronted with the information supplied by the informant. This Court used an *Aguilar-Spinelli* analysis in finding that the following facts were of primary importance in reaching its decision: the informant supplied very detailed information to a police officer, an independent verification by the officer corroborated the tip, and the informant had been personally involved in a criminal transaction with defendant one hour prior to the stop and search, i.e., possession of marijuana.

Even using a totality of circumstances analysis, we find *Tickle* to be distinguishable and helpful in our analysis of the case *sub judice*. The confidential informant in this case did not reveal how he or she obtained the knowledge that the merchandise was stolen, and the officers could not testify as to the informant's reliability. Noticeably absent is any indication that the informant conducted, participated in, or implicated himself or herself in any criminal transactions with defendant involving stolen goods. Knowledge of such details would give rise to a reasonable in-

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ference that the informant had access to reliable information about the suspect's illegal activities.

We note that the informant did inform the officers of the location of the alleged illegal activity and the color of the car defendant would be driving. Although the police attempted to verify the limited details of the tip, applying a totality of the circumstances analysis, we do not believe that the verified information included details that would ordinarily be known only to someone familiar with the suspects and their plans and activities.

Accordingly, we do not believe that this information provided an articulable basis to suspect that the goods were contraband and thus allow the officers to seize the items from the outbuilding. Thus, defendant's motion to suppress the evidence seized by the search should have been granted.

Because defendant's motion to suppress the evidence should have been granted, we need not address defendant's remaining assignments of error.

New trial.

Judges BECTON and GREENE concur.

R. GWYN WYATT v. NASH JOHNSON & SONS FARMS, INC.

No. 875SC605

(Filed 6 September 1988)

Master and Servant § 10— termination of employment— terms of contract unenforceable upon termination

Upon the termination of plaintiff's employment, effected by plaintiff's securing other employment and accepting defendant's termination notice, defendant was required to pay the ad valorem taxes on plaintiff's house for 1984 but was not required to pay taxes, insurance, and college expenses which accrued or became due after plaintiff's employment ceased; moreover, defendant had no right to collect a loan for plaintiff's house until expiration of the seven-year period provided for in the employment contract.

APPEAL by defendant from *Phillips, Herbert O., Jr. and Griffin, William C., Jr.*, Judges. Order entered 12 December 1986 and

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judgment entered 4 February 1987 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 3 December 1987.

Plaintiff sued to recover for breach of an employment contract, and following a hearing at which depositions and other materials were considered Judge Phillips, by an order of partial summary judgment, ruled that defendant breached the contract in certain respects. Later, following a trial without a jury, Judge Griffin determined plaintiff's damages. Defendant appealed both adjudications. The pertinent facts follow:

On 27 December 1979 defendant, whose business is situated in New Hanover County, employed plaintiff, then living and working in Charlotte, as its Corporate Comptroller and Chief Finance Officer by a written contract containing the following provisions:

1. *Term.* The Term of this employment shall begin December 27, 1979, and shall continue until either party hereto gives the other party twelve (12) months notice of his desire that this employment be terminated.

2. *Compensation.* For all services rendered by the Employee under this Agreement, the Employer shall pay the Employee the following:

a. The sum of FORTY-FOUR THOUSAND TWO HUNDRED AND NO/100 (\$44,200.00) DOLLARS, each year . . .

b. Extend to the Employee immediately credit of at least ONE HUNDRED THOUSAND AND NO/100 (\$100,000.00) DOLLARS . . . in cash money in order that same may be used by the Employee to purchase a dwelling . . . the Employee and his spouse shall simultaneously execute an appropriate promissory note payable after seven (7) years . . . without interest until demand is made.

c. The Employer shall pay all ad valorem town and county taxes and insurance as assessed and acquired in connection with the ownership of said dwelling during the first seven years of this employment.

d. The Employer shall provide the Employee with an appropriate automobile . . .

. . . .

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g. Employer shall pay a sum of money sufficient to . . . educate the Employee's two children . . . thereby enabling said children to attend a degree granting college or university of their choice and so long as they earn passing grades while continuously enrolled; such funds . . . shall be paid to the Employee by July 15 of the year prior to the enrollment of either of said children in the college of his choice which will include sufficient funds to pay such child's education for the entire college year and which will include tuition, room and food, but will not include clothing, spending money and transportation.

. . .

4. *Mutual Understanding.* Parties hereto agree that the provisions hereinabove made with reference to extending credit for the purchase of a residence of Employee in New Hanover County shall continue in existence and be binding for the full seven (7) year period notwithstanding that this Employment Agreement may be terminated prior thereto, provided, however, in the event the Employee gives notice of his desire to terminate said employment as hereinabove set forth, his obligation as indicated by the promissory note and deed of trust above referred shall become due 90 days after such notice having been given and he shall thereupon be required to pay said note and deed of trust in full pertaining to the acquisition of his dwelling in New Hanover County at such time.

Plaintiff and his family then moved to New Hanover County, where he and his wife bought a home with \$94,135.40 loaned to them by defendant, which they secured by a deed of trust on the property, and so far as the record shows no problem in regard to the contract arose until 19 March 1984. On that day defendant notified plaintiff by letter that his employment was "hereby terminated" and that the letter was the twelve months' notice required by the contract. In April, 1984 defendant hired Don Taber to coordinate and supervise its financial activities and directed plaintiff to report to him. On 4 June 1984 plaintiff wrote defendant stating that he had secured other employment and accepted defendant's termination notice "effective at 5:00 PM on Friday, June 15, 1984," and that a more formal notice was being prepared

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for the Board of Directors. On 5 June 1984 plaintiff's attorney wrote defendant stating that plaintiff's letter was written "with the full understanding and impression" that paragraphs 2b, c and g of the employment agreement would continue in "full force and effect" and hoped that defendant would honor those provisions. By letter on 13 June 1984 defendant advised plaintiff's attorney that plaintiff's resignation "effective as of June 15, 1984, is hereby accepted" and stated that they were studying the other provisions of his letter and would let him know later "what our position is going to be." On 26 June 1984 plaintiff advised defendant that the sons' college expenses for the 1984-85 school year—one son was a rising senior at Georgia Tech, the other a rising sophomore at Clemson—would amount to \$11,461 and requested payment by 15 July, but no payments were made. On 18 July 1984 defendant demanded that its loan to plaintiff be paid on or before 14 September and stated that if payment was not made steps to foreclose would be taken. Plaintiff then filed this suit, alleging that defendant had breached the employment agreement by failing to pay his children's college expenses, demanding payment of the mortgage loan, and threatening foreclosure; and that because of payments that were either due or to become due in future years defendant was indebted to him in the amount of \$67,246. By its answer defendant denied any breach and counter-claimed, alleging that plaintiff had breached the contract by quitting its employment before the twelve months' notice period expired.

By his order of partial summary judgment, Judge Phillips ruled that the contract and other exhibits established as a matter of law that defendant (a) terminated the contract both by its 19 March 1984 letter and by diminishing plaintiff's duties in April, 1984 and putting him under Taber's supervision; (b) breached the contract by failing to pay the college expenses of plaintiff's sons, by demanding payment on the note and deed of trust, and by failing to pay the taxes and insurance on plaintiff's home; (c) had no right to demand payment of the note and deed of trust until seven years after their date; and (d) was obligated to pay the college expenses of both sons "so long as they earn passing grades while continuously enrolled." Following trial of the damages issue, Judge Griffin entered judgment requiring defendant—

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(1) to pay the undergraduate school expenses of plaintiff's son, Kevin, at Georgia Tech from 1 July 1984 through 31 August 1985, and graduate school (masters degree in education) from September, 1985 through 15 June 1987, and the undergraduate school expenses of plaintiff's son, Roger, at Clemson from 22 July 1984 through December, 1987, and his graduate school expenses thereafter from 1 January 1988 through December 1989.

(2) to pay the insurance on plaintiff's home for 1985 and 1986 and the ad valorem taxes for 1984, 1985, 1986 and 1987.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for plaintiff appellee.

Wells, Blossom & Burrows, by Richard L. Burrows, for defendant appellant.

PHILLIPS, Judge.

In entering the order of partial summary judgment the trial court correctly held that the parties' contract, correspondence and other materials are without significant ambiguity or conflict and their meaning and effect is thus a matter of law for the court to determine. *Briggs v. American & Efird Mills, Inc.*, 251 N.C. 642, 111 S.E. 2d 841 (1960). But the court's determinations in the order as to what the materials mean are largely erroneous, as are the provisions of the final judgment based thereon.

First, the *employment contract* was not terminated either by defendant's 19 March 1984 letter or in April, 1984 by defendant changing the nature of plaintiff's duties, as the order states; nor for that matter was it terminated at any other time, as it is still in effect to some extent. What was terminated, as the court perhaps meant to state, was *plaintiff's employment or the parties' employee-employer relationship*; and that was terminated on 15 June 1984 at 5 o'clock in the afternoon by mutual agreement as a result of plaintiff accepting defendant's termination notice effective at that time, of defendant accepting the terms of plaintiff's acceptance, and of plaintiff working and being paid until but not after that time. Defendant's earlier letter, instead of terminating either the contract or plaintiff's employment, merely notified him as the contract authorized that his employment would end a year

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later. Thus, until plaintiff agreed to quit before then and defendant agreed that that would be satisfactory each clearly had a right under the contract for the relationship to continue until the year was out.

Second, the ending of plaintiff's employment ended defendant's obligation to pay the taxes and insurance on plaintiff's house and the college expenses of his sons, and the court's determination to the contrary is erroneous. The contract, as the excerpts quoted above show, entitled plaintiff to receive the following from defendant in compensation for his employment: a weekly salary, a paid vacation, the use of a company automobile, the payment of the taxes and insurance on his house, the payment of the college expenses of his sons, and an interest free loan to cover the down payment on a house. Plaintiff concedes that defendant's obligation to pay his salary, including while on vacation, and furnish him with a company car ceased when his employment terminated; but he maintains, and the court agreed, that the three other benefits or compensations provided for in the paragraph survived that event. The obligation to continue the interest free loan did survive the termination of plaintiff's employment, as the court correctly ruled, but only because Paragraph 4 of the contract explicitly required defendant to continue the loan until seven years after its date; but nothing in the contract suggests that defendant's obligation to pay the insurance and taxes on plaintiff's house and the college expenses of his sons continued after plaintiff's employment ceased. On the other hand, what is stated in the contract clearly establishes that those obligations ceased with plaintiff's employment. The opening sentence of Paragraph 2, entitled *Compensation*, states that all the compensations and benefits therein listed were to be paid or furnished by defendant to plaintiff "[f]or all services rendered by the Employee." The provision of Paragraph 2c requiring defendant to pay the insurance and taxes on the house is expressly limited by the phrase "during the first seven years of this *employment*," (emphasis supplied), which is quite different from the unqualified requirement to maintain the interest free loan for seven years, and since plaintiff's employment lasted only four and a half years defendant cannot be required to pay these benefits for any period longer than his employment. And the provision in Paragraph 2g concerning the children's college expenses required defendant to pay the sums

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due thereunder "to the Employee," which plaintiff no longer is and has not been since 15 June 1984. These provisions do not entitle plaintiff to continue receiving these benefits even though no longer employed by defendant, as the court ruled; they can only mean, in our judgment, that the parties intended and understood that these benefits were not bonuses of indefinite duration for signing the contract, but were perquisites of plaintiff's employment that would end when his employment ended.

Thus, defendant did not breach the contract by refusing to pay the taxes, insurance and college expenses that accrued or became due after plaintiff's employment ceased on June 15, 1984, and plaintiff's claims for the recovery of those sums should have been dismissed. If, however, plaintiff had remained in defendant's employment until July 15, 1984, defendant would have been obligated at that time, as Paragraph 2g of the contract provides, to pay the college expenses of his children for the upcoming year. But since plaintiff was not an employee of defendant when those expenses or the taxes and insurance payments for 1985 and thereafter accrued or became due the contract did not require defendant to pay them. We therefore vacate the provisions of the order of partial summary judgment and the judgment requiring defendant to pay (1) the college expenses of plaintiff's children after 15 June 1984; (2) the ad valorem taxes on plaintiff's house for the years 1985, 1986, and 1987; and (3) the insurance on plaintiff's house for 1985 and 1986. We affirm the provisions in the order and judgment requiring defendant to pay the 1984 ad valorem taxes on plaintiff's home, as that obligation accrued before plaintiff's employment terminated; and the holding that defendant had no right to collect the loan until 21 January 1987, which matter is moot since that date has passed. And we remand the matter to the Superior Court for the entry of judgment in harmony with the provisions of this opinion.

Affirmed in part; vacated in part; remanded with instructions.

Judges WELLS and PARKER concur.

Rice v. Wood

PATRICIA BAKER RICE, ADMINISTRATOR OF THE ESTATE OF DONALD WILFORD RICE AND PATRICIA BAKER RICE v. PAUL GREGORY WOOD AND KIM IRVING HEATH, D/B/A C & A ASSOCIATES

No. 8721DC1119

(Filed 6 September 1988)

Vendor and Purchaser § 1.4— exercise of option to repurchase—proper tender

Where a repurchase agreement was not specific as to the proper tender, notice to the optionees that plaintiffs were exercising the option through a phone call and letter from their attorney to defendants amounted to a proper tender. Actual tender of payment by plaintiffs was unnecessary, since defendants rejected plaintiffs' offer to repurchase.

APPEAL by defendants from *Biggs, Loretta C., Judge*. Judgment filed 25 June 1987 in District Court, FORSYTH County. Heard in the Court of Appeals 6 April 1988.

Legal Aid Society of Northwest North Carolina, Inc., by Ellen W. Gerber and Kate Mewhinney, for plaintiff-appellees.

Laurel O. Boyles and Joseph G. Gatto for defendant-appellants.

JOHNSON, Judge.

This case appears before this Court for the second time on appeal. In the first trial of this cause in September 1985, the jury found that the agreements entered into by the parties in 1980 constituted a mortgage rather than a sale to the defendants of the plaintiffs' home. The jury awarded damages in the amount of \$26,132.00 to the Rices, and defendants appealed.

On appeal, this Court remanded the case to the district court for a new trial. This Court held that although there was sufficient evidence to be submitted to the jury on the issue of whether the parties intended to create a mortgage, the trial court committed prejudicial error by refusing to submit to the jury the crucial requirement of the creation and continued existence of a debt. *Rice v. Wood*, 82 N.C. App. 318, 346 S.E. 2d 205 (1986).

Prior to the new trial in this cause, plaintiff, Donald Rice, died and his wife, Patricia Rice, was duly appointed as administrator of his estate. The case proceeded on behalf of the estate of Donald Rice and his widow in her individual capacity.

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On 8 June 1987, the case came on for trial for the second time. On 15 June 1987, the jury found that defendants had breached their contract to reconvey the property to the plaintiffs, who had attempted to exercise their option to repurchase according to the terms of the agreement. The jury awarded \$18,000.00 to Mrs. Rice and the estate of Donald Rice.

Defendants appeal from judgment entered on the verdict. By cross-assignments of error, plaintiffs attempt to present several other questions for review.

A full factual summary of this case is contained in our previous opinion. *Rice v. Wood, supra*.

Defendants' Assignments of Error

First, defendants contend that the trial court committed reversible error in denying their motion for directed verdict at the close of plaintiffs' evidence and renewed at the conclusion of all the evidence. We disagree.

Defendants contend that the plaintiffs did not exercise the option in the repurchase agreement because they did not make a valid tender to defendants to repurchase the property. More specifically, defendants contend that because there was only a "favorable indication" that Mr. Rice would obtain a loan from the credit union in order to repurchase the house, an offer by the Rices' attorney to repurchase the property did not amount to a valid tender.

The general rule concerning the exercise of an option to purchase or repurchase realty is that absent special circumstances, time is of the essence and acceptance and tender must be made within the time required by the option. *Wachovia Bank and Trust Co. v. Medford*, 258 N.C. 146, 128 S.E. 2d 141 (1962).

Whether tender of the purchase price is necessary to exercise an option depends upon the agreement of the parties as expressed in the particular instrument. The acceptance must be in accordance with the terms of the contract. Where the option requires the payment of the purchase money or a part thereof to accompany the optionee's election to exercise the option, tender of the payment specified is a condition precedent to a formation of a contract to sell unless it is waived by

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the optionor. On the other hand, the option may merely require that notice be given of the exercise thereof during the term of the option.

Kidd v. Early, 289 N.C. 343, 361, 222 S.E. 2d 392, 405 (1976) (citations omitted).

The repurchase agreement entered into by the parties in the case *sub judice* reads as follows:

We as Sellers, MR. DONALD W. RICE & MS. PATRICIA RICE and as Buyers, C & A ASSOCIATES agree to rental of property at 3036 Airport Road for \$216.00 per month and we as Sellers, agree to provide all maintenance for a period of EIGHTEEN MONTHS (18) to end February 28, 1982, *At which time we have the opportunity to repurchase this property at the below price as set out in detail.*

\$4017.00 Buyer Cash Outlay

753.00 Buyer's Profit for Period

4770.00 Total Amount Payable Plus Assumption.

This amount can be repaid, before period of time without penalty. This agreement is null and void if the rental agreement is broken by the Sellers.

Seller: s/Donald W. Rice

Buyer: s/P. G. Wood

Seller: s/Patricia Rice

Buyer: s/K. I. Heath

This repurchase agreement does not specifically state the requirements which must be met in order for plaintiffs to exercise the option, such as: whether payment is to be made in cash or by partial payment or whether notice is sufficient to constitute tender. Ambiguous contracts are to be construed most strongly against the drafting party. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978). Since the contract was not specific as to the proper tender, we believe that notice to the optionees that plaintiffs were exercising the option would amount to a proper tender.

The evidence reveals that plaintiffs' attorney telephoned defendant Gregory Wood to make an offer to repurchase their home. Subsequently, on 30 January 1981, plaintiffs' attorney

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mailed a letter which reiterated plaintiffs' desire to exercise their option to repurchase their home. Defendants did not respond to the phone call or letter. During the week of 24 March 1981, plaintiffs' attorney again contacted defendant Wood concerning the option to repurchase. Defendants informed plaintiffs' attorney that defendants were not interested in allowing the Rices to repurchase their home.

We believe this undisputed evidence reveals that plaintiffs gave defendants notice of their desire to exercise the option in their agreement. The testimony by plaintiffs' attorney was that he had verified that the loan had been approved. This evidence was sufficient to establish that plaintiffs were ready, willing and able to exercise the option to repurchase and comply with the contract. Plaintiffs' notice to defendants of their offer to repurchase was made within the time specified by the repurchase agreement. Despite this attempt to exercise the option, defendants' rejection of plaintiffs' offer prevented any tender of payment by plaintiffs. Notice from defendants that they would not carry out the terms of the option made an actual tender of payment by the plaintiffs unnecessary, as the attempt would have been futile. *See Smithfield Oil Co. v. Furlonge*, 257 N.C. 388, 126 S.E. 2d 167 (1962).

Since the contract was ambiguous as to the proper tender, the issue concerning whether payment of the purchase price or notice of an intent to exercise the option would be required, was for the jury to determine. "Ambiguities in contracts are to be resolved by the jury upon consideration of 'the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.'" *Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 157, 306 S.E. 2d 587, 590 (1983), quoting, *Silver v. North Carolina Board of Transportation*, 47 N.C. App. 261, 268, 267 S.E. 2d 49, 55 (1980). Therefore, because the jury was to decide whether a valid tender was made by the plaintiffs, the defendants were not entitled to a directed verdict as a matter of law. Defendants' assignment of error is overruled.

Defendants next contend that the court erred in failing to instruct the jury as they requested on the legal definition of tender. We disagree. Defendants argue that the court, as a matter of law, should have stated that a valid exercise of the option required ac-

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tual tender of the total amount payable. As we have previously stated, the repurchase agreement did not specifically state what would constitute a valid tender. Therefore, it would have been error for the trial court to have instructed the jury as per defendants' request.

Insofar as defendants' remaining assignments of error are concerned, we find them meritless and without need for discussion.

Plaintiffs' Cross-Assignment of Error

Plaintiffs requested that this Court consider their cross-assignments of error only if the judgment of the trial court was not affirmed. In light of our ruling, we find it unnecessary to consider them.

For all the aforementioned reasons, in the trial of this matter we find

No error.

Judges BECTON and GREENE concur.

JERRY HAWKINS, ADMINISTRATOR OF THE ESTATE OF BOBBY DALE HAWKINS, PLAINTIFF v. HERBERT HOUSER AND WIFE, SUE HOUSER, T/A TRIPLE H MOBILE HOME PARK, DEFENDANTS

PEGGY PLESS, ADMINISTRATOR OF THE ESTATE OF RODNEY PLESS, PLAINTIFF v. HERBERT HOUSER AND WIFE, SUE HOUSER, T/A TRIPLE H MOBILE HOME PARK, DEFENDANTS

HERBERT HOUSER AND WIFE, SUE HOUSER, T/A TRIPLE H MOBILE HOME PARK, THIRD PARTY PLAINTIFFS v. JERRY HAWKINS, ADMINISTRATOR OF THE ESTATE OF BOBBY DALE HAWKINS, THIRD PARTY DEFENDANT

No. 8727SC594

(Filed 6 September 1988)

1. Negligence § 59.3— drowning in pond—12-year-old victim and rescuer—no contributory negligence as matter of law

In a wrongful death action where the evidence tended to show that decedents drowned in a pond on defendants' property, decedents were not con-

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tributorily negligent as a matter of law, since one decedent was only 12 years old, and the other was undertaking to save the 12 year old's life under circumstances which did not appear to be rash.

2. Negligence § 51.1— maintenance of unfenced, unposted pond on rural property—no negligence

Defendants' maintaining of an unfenced, unposted pond on their rural land was not by itself negligence where drowning victims were capable of appreciating the danger of ice on the pond giving way; one decedent was a trespasser on the pond; defendants did nothing to conceal or enhance the danger; and the attractive nuisance doctrine did not apply because the trespassing decedent was not a child of tender years but an intelligent 12 year old capable of recognizing the danger in riding a bicycle over an ice-covered body of water.

3. Negligence § 51.1— drowning in pond—improper directions given to rescue personnel—sufficiency of evidence of negligence

In a wrongful death action where the evidence tended to show that decedents drowned in a pond on defendants' property, evidence that defendants, in making a call to rescue personnel, suggested that the rescuers travel to the pond by a time-wasting barricaded road when an unimpeded road was available was evidence that defendants did not use ordinary care, and summary judgment was therefore improper.

4. Negligence § 22— negligence in misdirecting rescuers—sufficiency of complaint

Even though plaintiffs did not allege in their complaint that defendants were negligent in misdirecting a rescue crew, such deficiency was not automatically fatal to plaintiffs' claims, since the alleged negligence arose out of drownings in defendants' pond; the complaint notified defendants of these occurrences; and an amendment to allege the misdirection, though made more than two years after the deaths, would relate back to the filing of the complaint.

APPEAL by plaintiffs from *Saunders, Judge*. Orders entered 24 March 1987 in Superior Court, LINCOLN County. Heard in the Court of Appeals 3 December 1987.

Joseph B. Roberts, III and Geoffrey A. Planer for plaintiff appellants.

Jonas, Jonas & Rhyne, by Richard E. Jonas, for defendant appellees.

PHILLIPS, Judge.

These two wrongful death actions were dismissed by an order of summary judgment following a hearing at which the

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court considered affidavits, depositions, and other materials which indicate the following: In January, 1985 on defendants' 220-acre tract of Lincoln County farm and woodland were situated their dwelling house, a mobile home park containing 25 trailer sites in one area and 30 in another, and about a quarter of a mile from the park an unenclosed, unposted farm pond about 150 feet wide, which residents of the trailer park often visited and fished in. On 28 January 1985 the pond was frozen over and some boys from the trailer park skated on the ice. On 29 January 1985 decedents Pless and Hawkins, both residents of the trailer park, drowned in the pond after Pless, age 12, even though warned by Hawkins not to do so and warned earlier by defendants not to go into the pond, rode his bicycle onto the ice and fell through near the center of the pond and Hawkins, age 26, also on a bicycle, tried to rescue him. Though both fell into the icy water and neither could swim they were able to stay afloat for about 40 minutes by holding onto Hawkins' bicycle which did not sink, as Pless's did. Their calls for help were heard by other park residents, who had defendants telephone the rescue squad in Lincolnton. Two or more unimproved dirt roads on defendants' property led to the pond, one of which leading off from State Road #1280 had been blocked by defendants with felled trees to reduce vehicular traffic near the pond. In telephoning the rescue squad, defendant Sue Houser, with her husband's concurrence, told the crew to use the road off State Road #1280 in getting to the pond. But the rescue crew was unable to get to the pond on that road though they tried to get around the felled tree for about 15 minutes, and when they got to the pond by another unblocked route the victims had just expired.

Plaintiffs' information concerning the misdirected rescue attempt was obtained during discovery after the action was filed and in their complaints they alleged only that defendants were negligent in maintaining the pond, in failing to enclose it, in failing to put warnings around it, and that it was an attractive nuisance to neighborhood children. The defendants denied any negligence and alleged that the decedents were contributorily negligent.

Since our jurisprudence favors the trial of cases on their merits when there are any merits to litigate, it is proper to dismiss an action by summary judgment under the provisions of

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Rule 56(a), N.C. Rules of Civil Procedure, only when it clearly appears from the materials considered by the trial judge that no genuine issue of material fact exists between the parties with respect to the controversy being litigated. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). The controversy in litigation here is whether defendants were negligent in causing the drownings of the decedents and whether the decedents were contributorily negligent in causing their own deaths. With respect to these issues the materials considered by the court lead to and require the following conclusions as a matter of law:

[1] *First*, the order cannot be upheld on the ground that decedents were contributorily negligent as a matter of law, and defendants do not argue otherwise. Because the materials show that an issue of fact does exist as to the decedents' contributory negligence, since decedent Pless was only 12 years old, *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974), and the decedent Hawkins was undertaking to save his life under circumstances that do not appear to be rash, even in retrospect. *Alford v. Washington*, 244 N.C. 132, 92 S.E. 2d 788 (1956).

[2] *Second*, the materials do show, however, that no genuine issue of fact exists as to the alleged negligence of the defendants in maintaining the unenclosed, unposted pond on their property. Sifted down the evidentiary forecasts on this issue indicate only that defendants maintained the pond in the farm and rural setting described and our law is that maintaining an unfenced, unposted body of water upon one's rural land by itself is not negligence. *Matheny v. Stonecutter Mills Corp.*, 249 N.C. 575, 107 S.E. 2d 143 (1959). According to the materials the victims were capable of appreciating the danger of the ice giving way, the decedent Pless was on the pond as a trespasser, defendants did nothing to either conceal or enhance the danger, and the attractive nuisance doctrine does not apply because the decedent Pless was not a child of tender years but an intelligent 12 year old capable of recognizing the danger in riding a bicycle over an ice-covered body of water. *Dean v. Wilson Construction Co.*, 251 N.C. 581, 111 S.E. 2d 827 (1960). Thus, the claims that defendants were negligent in maintaining the pond were properly dismissed, and to that extent the orders are affirmed; but the dismissals of the actions are not affirmed for the reasons stated below.

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[3, 4] *Third*, the materials show that an issue of fact does exist as to defendants' negligence in misdirecting the rescue squad to where the victims were in imminent peril of drowning or dying by hypothermia in the icy water. Defendants, though volunteers in telephoning for aid, had the positive duty to use ordinary care in performing that task, *Stewart v. Allison*, 86 N.C. App. 68, 356 S.E. 2d 109 (1987), the known and obvious purpose of which, under the circumstances, was to inform the rescue squad where the endangered persons were and an expeditious way to get there. Evidence that in making the call defendants suggested that the rescuers travel to the pond by a time-wasting barricaded road when an unimpeded road was available is evidence that defendants did not use ordinary care. Defendants' only argument on this point is not that the evidentiary forecast does not raise the question of fact, but that negligence by misdirecting the crew was not alleged in the complaint. This deficiency is not automatically fatal to plaintiffs' actions, as it would have been under our former procedure, because under our modern notice pleading system amendments to the pleadings are liberally permitted when the evidence and circumstances warrant, even at trial, Rule 15(b), N.C. Rules of Civil Procedure; *Roberts v. William N. and Kate B. Reynolds Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972), and the circumstances in this case appear to warrant such an amendment. In *Hardison v. Williams*, 21 N.C. App. 670, 205 S.E. 2d 551 (1974), a summary judgment dismissing the action was reversed because the record indicated an issue of fact existed as to an act of negligence that had not been alleged in the complaint and that grounds existed for allowing an amendment to allege that act. Substantially the same situation exists here. Since the trial is yet to be scheduled and the information as to the unalleged act of negligence was apparently elicited from defendants after the complaint was filed defendants should have no difficulty in preparing to defend this issue. Though the deaths occurred more than two years ago the amendment, if allowed, would not be a "new action" barred by the statute of limitations, as defendants contend. Since the negligence that would be alleged arose out of the drownings in their pond and the complaint notified defendants of these occurrences the amendment would relate back to the filing of the complaint. Rule 15(c), N.C. Rules of Civil Procedure; *Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E. 2d 240 (1984). As stated in

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Estrada, “[t]o hold otherwise would negate the very policies embodied in Rule 15.” *Ibid.* at 636, 321 S.E. 2d at 246.

Thus, we reverse the orders dismissing the actions and remand the matters to the Superior Court for a determination as to whether plaintiffs may amend their complaints to allege that defendants were negligent in misdirecting the rescue squad to the pond in which the decedents were marooned.

Affirmed in part; reversed in part; and remanded.

Judges WELLS and PARKER concur.

TRAVELERS INDEMNITY COMPANY v. BOBBY ALAN MARSHBURN

No. 8710DC1208

(Filed 6 September 1988)

Venue § 2.1— foreign corporation—business conducted and office maintained in Wake County—proper venue

Wake County was the proper venue for an action between plaintiff foreign corporation and defendant resident of Duplin County where plaintiff conducted business and maintained a regional office in Wake County. N.C.G.S. § 1-79.

APPEAL by defendant from *Creech (William A.), Judge*. Judgment entered 17 August 1987 in District Court, WAKE County. Heard in the Court of Appeals 7 April 1988.

Gene Collinson Smith, Esq., for plaintiff-appellee.

Rivers D. Johnson, Jr., for defendant-appellant.

GREENE, Judge.

This is an appeal from the trial court's denial of defendant's motion for a change of venue pursuant to N.C.G.S. Sec. 1-83 (1983). Plaintiff is a Connecticut Insurance Corporation licensed to do business in North Carolina by the North Carolina Insurance Commission. Defendant is a citizen and resident of Duplin County. Plaintiff filed this action in Wake County.

Plaintiff presented evidence by affidavit in which its resident supervisor in Raleigh stated that plaintiff "maintains offices and

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does business in the State of North Carolina, with a regional office at 3716 National Drive, Raleigh, N.C. 27612." After hearing the arguments of the parties, the trial judge found that plaintiff did conduct business in Wake County and had a regional office in Raleigh. Therefore, he concluded venue was proper in Wake County and denied defendant's motion. Defendant appeals.

The sole issue before us is whether the trial judge erred in denying defendant's motion for a change of venue where there was no showing that Wake County was defendant's principal place of business.

As a preliminary matter, we note defendant-appellant did not set out in the record an exception immediately following the judicial action to which his exception was addressed, i.e., the order denying his motion. "Exceptions appearing only under purported assignments of error, and not duly noted in the record as required by [Rule 10 of the North Carolina Rules of Appellate Procedure] are ineffective." *State v. White*, 82 N.C. App. 358, 360, 346 S.E. 2d 243, 245 (1986). We nevertheless choose to exercise the discretion granted in Rule 2 of our Appellate Rules and consider defendant's assignment of error because of a change in the applicable venue statute, N.C.G.S. Sec. 1-79, since the appellate courts last addressed this issue. We hold the trial judge did not err in denying defendant's motion.

When an action is not brought in a proper county the question of removal is not one left to the trial court's discretion. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E. 2d 54 (1952). Rather, upon motion of a party, the action must be removed where it has not been brought in the proper county. *Id.* Furthermore, an appeal from the refusal of a judge to remove a case to the proper county is not premature. *Coats v. Sampson County Mem. Hosp.*, 264 N.C. 332, 141 S.E. 2d 490 (1965).

Defendant cites the case of *Crain and Denbo, Inc. v. Harris and Harris Const. Co.*, 250 N.C. 106, 108 S.E. 2d 122 (1959) for the proposition that venue was improper in Wake County. In *Crain*, our Supreme Court spoke to the issue of the proper county for venue purposes in an action between a resident of North Carolina and a domesticated foreign insurance company. The Court first

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noted that by complying with the provisions of N.C.G.S. Sec. 58-150, the insurance company acquired the right to sue and be sued in state court under the same rules and statutes applicable to domestic corporations. *Id.* at 110, 108 S.E. 2d at 125; *see also Hill v. Atlantic Greyhound Corp.*, 229 N.C. 728, 51 S.E. 2d 183 (1949). In determining how to apply this rule, the Court quoted the then applicable version of Section 1-79 which concerns the residencies of domestic corporations for venue purposes:

For the purpose of suing and being sued, the residence of a domestic corporation is as follows: (1) Where the registered office of the corporation is located. (2) If the corporation having been formed prior to July 1, 1957 does not have a registered office in this State, but does have a principal office in this State, its residence is in the county where such principal office is said to be located by its certificate of incorporation, or amendment thereto, or legislative charter.

Crain, 250 N.C. at 111, 108 S.E. 2d at 126.

The Court found the insurance company did not fall within either subdivision of Section 1-79. The insurance company did not maintain a registered office in Wake County nor was it required under Section 58-150 to file a statement with the Commissioner of Insurance setting forth its "principal or registered office" or "principal place of business." The Court concluded that because the insurance company had no registered or principal office in Wake County, N.C.G.S. Sec. 1-79 did not entitle it as a matter of right to have the action removed to Wake County. *Crain*, 250 N.C. at 112, 108 S.E. 2d at 127.

Therefore, the Court relied on the residual venue statute, N.C.G.S. Sec. 1-82, which provides: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement." The Court then recognized the general common law rule that in the absence of express statutory authority fixing the residence of a corporation within the State, the residence of a corporation is where its principal office or place of business is located. *Crain*, 250 N.C. at 112, 108 S.E. 2d at 127. The Court found that since the insurance company had not shown its principal office or place of business was in Wake County, it was further not entitled to have the action tried in Wake County under Section 1-82.

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However, since the *Crain* decision, our General Assembly has amended N.C.G.S. Sec. 1-79. Effective 1 January 1976, the statute now provides:

For the purpose of suing and being sued *the residence of a domestic corporation is as follows:*

(1) Where the registered or principal office of the corporation is located, or

(2) *Where the corporation maintains a place of business.*

(3) If no registered or principal office is in existence, and no place of business is currently maintained and can reasonably be found, the term "residence" shall include any place where the corporation is regularly engaged in carrying on business.

N.C.G.S. Sec. 1-79 (emphasis supplied).

Under the amended statute, determining the residence of a domestic corporation no longer includes only the application of the two provisions present in the version that existed when the Supreme Court decided *Crain*. As noted above, the general rule is that a domesticated foreign corporation is treated like a domestic corporation for venue purposes. Defendant does not dispute that plaintiff is a domesticated foreign insurance corporation by virtue of plaintiff's compliance with N.C.G.S. Sec. 58-150. Therefore, plaintiff is treated as a domestic corporation for venue purposes and Section 1-79 applies.

The trial judge specifically found that plaintiff was conducting business and was maintaining a regional office in Wake County. Defendant did not except to these findings. Plaintiff comes within the provisions of Section 1-79(2) and therefore is a resident of Wake County. Accordingly, venue was proper in Wake County and the trial judge's decision is

Affirmed.

Judges BECTON and JOHNSON concur.

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BRENDA S. MC LAIN, ADMINISTRATRIX OF THE ESTATE OF L. J. MACK, DECEASED v.
ALICE M. WILSON AND HOME FEDERAL SAVINGS & LOAN ASSOCIA-
TION

No. 8827SC139

(Filed 6 September 1988)

**Banks and Banking § 4— signature card for joint account—notation limiting
withdrawals to one cotenant—notation ineffective to affect survivorship rights**

Where signature cards for three bank accounts designated a deceased person and defendant "as joint tenants with right of survivorship" and instructed defendant bank "to act pursuant to any one of the joint tenants' signatures . . . in any manner in connection with this account and, . . . to pay . . . to any one or the survivor," a typed addition indicating that withdrawals were to be made only by the deceased person had no effect on defendant's interest in the accounts, since the right of survivorship was properly established under N.C.G.S. § 41-2.1; the intent of the parties was to establish accounts with right of survivorship; the notation limiting withdrawals was a subsequent clause which was irreconcilable with the former clause requiring the bank to honor any of the parties' signatures; and the notation regarding withdrawals was repugnant to the general purpose of the contract.

APPEAL by defendant Wilson from *Gardner (John M.), Judge*. Judgment entered 29 October 1987 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 2 June 1988.

Plaintiff, administratrix of the estate of L. J. Mack (deceased), brought a declaratory action against Alice M. Wilson and Home Federal Savings & Loan Association (Home Federal). Plaintiff sought adjudication regarding the rights of the parties to four bank accounts (three of which are the subject of this appeal) on deposit at Home Federal.

The three accounts in question before this Court are account numbers 1-207607-0, 620041744, and 620041720. The signature cards for each of these accounts designated L. J. Mack and Alice M. Wilson "as joint tenants with right of survivorship" and instructed Home Federal "to act pursuant to any one or more of the joint tenants' signatures, shown below, in any manner in connection with this account and, . . . to pay, without any liability for such payment, to any one or the survivor or survivors at any time." Both L. J. Mack and Alice M. Wilson signed all three cards.

On each card beside Alice M. Wilson's typed name appears the word "beneficiary." However, each card has a typed addition

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indicating that withdrawals be made only by L. J. Mack. Although both could deposit money into the accounts, L. J. Mack made all of the deposits.

The trial judge, sitting without a jury, concluded that these accounts "are not deposit accounts with right of survivorship in that these accounts do not contain the fundamental incident set forth in G.S. 41-2.1(b)(1) that either party to the agreement may draw upon any part or all of the deposit account." The trial court ruled that the estate of L. J. Mack was entitled to all of the funds on deposit in these accounts. From this judgment, defendant Alice M. Wilson appeals.

Brenda S. McLain, attorney for plaintiff-appellee.

Frank Patton Cooke, by Malcolm B. McSpadden, attorney for defendant-appellant.

ORR, Judge.

On appeal, defendant contends that she is entitled to the funds on deposit in the three accounts. Defendant argues that the right of survivorship was properly established under N.C.G.S. § 41-2.1, and that the notation requiring withdrawals to be made only by L. J. Mack had no effect on her interest in the account. We agree.

The notation "withdrawals only by L. J. Mack" is in direct contradiction to the clause that Home Federal "act pursuant to any one or more of the joint tenants' signatures, shown below, *in any manner* in connection with this account . . ." (Emphasis added.) Therefore, we must review the signature cards in light of contract law to determine if either or both clauses are in effect before determining whether or not the signature cards comply with N.C.G.S. § 41-2.1.

The law of contracts in North Carolina provides many rules of construction. Three of those rules are particularly pertinent to this case. First, "[t]he intent as embodied in the entire instrument must prevail . . ." *Electric Supply Co. v. Burgess*, 223 N.C. 97, 100, 25 S.E. 2d 390, 392 (1943). Three factors are considered in ascertaining the intent of the contract; "the nature of the instrument, the condition of the parties executing it, and the objects

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which they had in view." *Refining Co. v. Construction Co.*, 157 N.C. 276, 281, 72 S.E. 1003, 1005 (1911).

Here, all three factors indicate an intent that both parties have a right of survivorship in the bank accounts. The nature of the instrument is a standard form for a joint bank account with right of survivorship. The parties were two lay people acting without benefit of legal counsel to execute a contract providing for joint tenancy with right of survivorship. This objective is evidenced by the stipulations that the parties were joint tenants with right of survivorship, that a pro rata share of all deposits made by one was a gift to the other, and that Home Federal was to pay any part or all of the funds to the survivor.

The second applicable rule of construction is that a clause "which is utterly repugnant to the body of the contract and irreconcilable with it, will be rejected; likewise, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract, will be set aside." *Jones v. Casualty Co.*, 140 N.C. 262, 265, 52 S.E. 578, 579 (1905). In the case *sub judice*, the instrument is a form contract with the notation regarding withdrawals which was added subsequent to the original wording of the contract. Therefore, the notation is a subsequent clause which directly contradicts the former clause that Home Federal honor "any one or more" of the parties' signatures "in any manner" regarding the accounts.

We cannot conceive of a construction that would reconcile the two clauses. Either both parties may act alone or together "in any manner in connection with [the] account[s]" or only one of the two parties, L. J. Mack, may withdraw the funds. However, both clauses cannot be true at the same time. This analysis is also important with regard to the third rule of construction which states that "each and every part of the contract must be given effect, if this can be done by any fair or reasonable interpretation . . ." *Davis v. Frazier*, 150 N.C. 447, 451, 64 S.E. 200, 202 (1909). After much consideration we cannot foresee an interpretation of this contract which would reconcile the two clauses in such a way as to reasonably allow both to take effect.

Having determined that the two clauses are irreconcilable, we now must consider whether or not the notation regarding withdrawals is also repugnant to the general purpose of the contract.

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Given the three factors discussed earlier, the intent and general purpose of the contract was to provide a joint bank account with right of survivorship. While right of survivorship as a legal incident to joint tenancy has been abolished in North Carolina, N.C.G.S. § 41-2, the legislature has provided for the right of survivorship in bank accounts which meet certain statutory requirements. N.C.G.S. § 41-2.1 (1984).

N.C.G.S. § 41-2.1(b) states in pertinent part:

A deposit account established under subsection (a) of this section shall have the following incidents:

- (1) *Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.* [Emphasis added.]

But for the withdrawal clause, the contract would clearly comply with N.C.G.S. § 41-2.1. We therefore conclude that under the accepted rules of contract construction, the withdrawal clause should be disregarded and the contractual terms allowing both parties the right to act in any manner regarding the account will control.

Thus, the trial court's ruling in favor of the plaintiff is reversed, and the case is remanded for further action consistent with this opinion.

Reversed and remanded.

Judges EAGLES and SMITH concur.

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DEBORAH MOORE, ADMINISTRATRIX OF THE ESTATE OF KEVIN JAMAL MOORE
v. TIMOTHY RANDALL WILSON

No. 8826SC73

(Filed 6 September 1988)

Automobiles § 63.1— striking child darting into road— sufficiency of evidence of negligence

The trial court in a wrongful death action erred in entering summary judgment for defendant where the depositions of the eyewitnesses sharply conflicted as to the speed limit at the scene, the location of the child and a parked car, how the child got into the street, how long he was there before being hit, and how fast defendant was driving his car, and such evidence raised an issue as to whether defendant maintained a proper lookout.

APPEAL by plaintiff from *Snepp, Judge*. Order entered 2 November 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 June 1988.

Olive-Monnett, P.A. & Associates, by Paul Hefferon, for plaintiff appellant.

Collie and Wood, by James F. Wood, III, for defendant appellee.

PHILLIPS, Judge.

This action for the wrongful death of Kevin Jamal Moore, age two years and eleven months, was dismissed by an order of summary judgment following a hearing at which several depositions and other materials were considered. The child, who lived at 5419 Lawrence Orr Road in Charlotte with his parents and two older brothers, was killed in the street in front of his house on a clear, dry, sunny September evening by a car operated by defendant. In dismissing plaintiff's action and concluding as a matter of law that the materials established that defendant was not negligent in causing the child's death the court apparently was under the impression that the depositions of the several persons who witnessed the accident were all to the effect that the child suddenly darted into the street in front of defendant's car when it could not possibly be stopped; but that impression was not well-founded and the summary judgment based thereon is erroneous. For the testimony in regard to defendant's negligence was conflicting and

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summary judgment is authorized only when it clearly appears that no material issue of fact exists. Rule 56(c), N.C. Rules of Civil Procedure; *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975).

The depositions are without material conflict as to the following circumstances, none of which, however, bear directly upon defendant's alleged negligence: Lawrence Orr Road at that place is a two-lane street approximately 24 feet wide that runs north and south; for cars going north the Moore house was on the right immediately after the Mundy house; at the far or north end of the Moore's lot was their driveway entrance, next to which was a pampas grass bush between four and six feet high and the mailbox; and directly across from the Moore house was a cul-de-sac named Sun Ray Court. At the time involved a neighbor's car, between ten and fifteen feet long, was parked on the side of the street that the Moore and Mundy houses were on, but as to just where the witnesses differed, and several children were playing or talking and at least one adult was standing in the cul-de-sac across the street. Immediately before the accident defendant, age 24, was driving a Toyota Starlet in a northerly direction on Lawrence Orr Road and no other traffic was present. Immediately before the child got into the street, according to all the witnesses who claimed to have seen him actually enter the street, he was standing at the edge of the driveway to his house, next to the pampas grass bush and mailbox. But as to the matters upon which defendant's alleged negligence depends, including how the child got in the street, how long he was there before he was hit, what part of the car hit him, where the impact between car and child occurred, how fast defendant was traveling, what defendant's actions and the speed limit were, and whether the parked car obscured defendant's view of the child, the depositions are sharply in conflict.

One witness said the speed limit was 35, others said it was 25. One witness said the car was parked mostly in front of the Mundy house near the Moore property line, another said it was in front of the Moore house, and still another said it was parked next to the Moore driveway. Three people, all standing in Sun Ray Court across the street, testified that they saw the child enter the street and get hit by defendant's car but they were not unanimous as to what was seen. *Betty Mundy*, age 28, testified that though she yelled to Kevin, standing by the mailbox and

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pampas grass bush, "Don't come out in the street," the child nevertheless ran into the street and was immediately hit by defendant's car, which had slowed down to pass the parked car and was not going fast at all. She also testified that the impact occurred in the middle of the street, the right front of the car hit the child and knocked him up into the air, and after defendant's car stopped at the end of the block "one house length" away (a distance not testified to by anybody), he walked back to the scene and told her and other onlookers "I didn't see it. I didn't see nothing. All I knew was when I hit something, I knew I had hit it. I didn't see him when he ran out." *Dana Faulkenbury*, age 12, testified that upon seeing Wilson's car approaching she turned to see if the child was still by the driveway and he was two or three feet into the street, but she did not know whether he had walked or run in getting there, and that he was hit by the right front fender of the car. *Elizabeth Deal*, age 16, testified that the child walked into the street and was in it three to five seconds before he was hit by the car's bumper, and that the impact occurred in the right lane. *Jan Wilcalis*, age 35, who was between the Moore house and the Mundy house, testified that she heard the impact, looked up and saw the child in the middle of the street about ten feet in the air, and that there was a mark on the driver's side of the car. She also testified that shortly before the accident (how long was not estimated) she saw the child playing in Sun Ray Court with other children, she thought he entered the street from that side but was not sure since she did not actually see him enter the street, and that after the accident she heard defendant tell a police officer he was going a little fast and when he saw the children in the cul-de-sac thought to himself that he should slow down but did not do so. *Defendant* testified that as he approached the Moore house he was traveling between 15 and 20 M.P.H. and upon seeing the children in Sun Ray Court to his left slowed down, and that immediately after passing the parked car and while his car was in the middle of the street he felt an impact, but did not see the child until after it was hit by the right front of the car.

One of plaintiff's allegations of neglect is that at the time and place involved defendant did not maintain a proper lookout as the law requires of all who operate motor vehicles on a public road or street. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E. 2d 121 (1971).

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This allegation is supported by the following portions of the above stated evidence: Defendant's admission that he did not see the child at all before his car hit him, Elizabeth Deal's testimony that the child walked rather than ran into the street and was there three to five seconds before it was hit, and the testimony of Jan Wilcalis that the impact occurred in the middle of the street and the child was hit by the front of the car on the driver's side.

The dismissibility of plaintiff's claim for negligence being the only question before us and having ruled that the claim was erroneously dismissed, it is neither advisable nor necessary that we go further and determine the probative effect, if any, of the other testimony referred to and whether it supports any other allegations of neglect; for those questions may not arise at trial and if they do the context may not be the same, and our duty is to determine the validity of the order appealed from, not chart the course at trial.

Vacated and remanded.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. JAMES HOWELL HENSLEY

No. 8725SC1240

(Filed 6 September 1988)

1. Assault and Battery § 16.1; Rape and Allied Offenses § 6.1— second degree sexual offense—assault with deadly weapon inflicting serious injury—instructions on lesser offenses not required

Where defendant was convicted of second degree sexual offense and assault with a deadly weapon inflicting serious injury, the trial court was not required to instruct on the lesser offenses of attempt to commit a sexual offense or simple assault, since there was no conflicting evidence, and the fact that there was some inconsistency with regard to some of the incidental details of the crimes did not require submission of the lesser offenses.

2. Rape and Allied Offenses § 7; Assault and Battery § 17; Criminal Law § 26.5—second degree sexual offense—assault with deadly weapon inflicting serious injury—no double jeopardy

The trial court did not err in failing to instruct the jury not to consider evidence of serious injury caused by the sexual offense in determining its ver-

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dict on the assault with a deadly weapon inflicting serious injury charge, since, in convicting defendant of second degree sexual offense, the jury necessarily found that no serious injury was inflicted during that offense; in convicting him of assault with a deadly weapon inflicting serious injury, they necessarily found that the prosecutrix's only serious injury was inflicted during the assault with the deadly weapon; and the two convictions were not supported by the same evidence, and defendant was therefore not being punished twice for the same conduct.

APPEAL by defendant from *Sitton, Judge*. Judgments entered 31 July 1987 in Superior Court, BURKE County. Heard in the Court of Appeals 31 May 1988.

Defendant was convicted of second degree sexual offense and assault with a deadly weapon inflicting serious injury. The State's evidence tended to show, in gist, that: He beat his live-in girlfriend, Pamela Jean Cogdell, off and on for most of the day about the head and other parts of the body with his fists and a metal walking cane about three feet long, the handle and shaft of which were about three inches in circumference. During the beatings he tied her hands behind her back, gagged her mouth with his shirt, threatened to kill the baby she was pregnant with, and rammed the cane inside her vagina several times. As a result of this savagery most of her body was black and blue and had cane markings or imprints on it; the back of her head was lacerated; her face bled severely, her eyes were swollen shut, her nose and lips were distorted and swollen; her vagina was lacerated and hemorrhaged heavily; she lost about 25 cubic centimeters of blood, was hospitalized for four days, her head wound was stitched, the baby was lost, and she was treated with various medicines and I.V. fluids.

Attorney General Thornburg, by Assistant Attorney General Wilson Hayman, for the State.

Sam J. Ervin, IV for defendant appellant.

PHILLIPS, Judge.

In a prolix 50 page brief defendant contends that the judge's charge to the jury was erroneous in three respects. Neither contention has merit and we overrule them.

[1] Two of defendant's contentions, not based upon exceptions to the charge, are that because of conflicts in the evidence it was

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"plain error" under the rule laid down in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) not to instruct the jury on the lesser included offenses of attempted first and second degree sexual offense and simple assault. On the sexual offense charge the conflict that would support a finding that the crime was only attempted, so defendant argues, was in the evidence as to penetration. But that evidence was not conflicting at all; for Ms. Cogdell testified that defendant repeatedly penetrated her with the cane, the physical findings testified to by the Emergency Room doctor who examined her bore her out, and no evidence to the contrary was presented. Since there was no evidence that the sexual offense was not accomplished the court was not required to instruct the jury on attempting to commit the offense. *State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). In the felony assault case, so defendant argues, the conflict that raised an issue as to simple assault was in the evidence as to using a deadly weapon and inflicting serious injury. In our search of the record we found plenary evidence indicating that defendant repeatedly beat Ms. Cogdell with a metal walking cane, a weapon clearly capable from our observation of inflicting a lethal wound when used as a club, *State v. Perry*, 226 N.C. 530, 39 S.E. 2d 460 (1946), and that she suffered very serious injuries, indeed, as a consequence; but we found no evidence which indicates that she was not beaten with the cane or that she was not seriously injured by it. Thus, the court's failure to charge on simple assault was not error, plain or otherwise. These arguments when analyzed are really not that the evidence on the elements involved was conflicting because defendant offered no evidence, but that because some of the incidental details of the crimes are inconsistent the jury could have rejected it and found that the lesser included offenses were committed. Though the arguments are not without logic, and for that matter are in complete harmony with the instruction given every jury, that they can believe all, part, or none of the evidence as they see fit, our Supreme Court has rejected it many times, *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954), and we must do likewise.

[2] Defendant's other contention, that the trial court erred in failing to instruct the jury not to consider evidence of serious injury caused by the sexual offense in determining its verdict on

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the assault with a deadly weapon inflicting serious injury charge, is irrelevant. For though he was charged with first degree sexual offense, elements of which as G.S. 14-27.4 provides, can include use of a deadly weapon or the infliction of serious injury, he was not convicted of that offense; he was convicted of second degree sexual offense which does not include either of those elements. See G.S. 14-27.5; *State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981). Thus, that the jury was not instructed on the felony assault charge not to consider the injuries inflicted in the sexual assault could not have affected their verdict on that charge; for in convicting him of second degree sexual offense the jury necessarily found that no serious injury was inflicted during that offense, and in convicting him of assault with a deadly weapon inflicting serious injury they necessarily found that the prosecutrix's only serious injury was inflicted during the assault with the deadly weapon. On this point defendant further argues, mistakenly, that the two convictions are supported by the same evidence and he is being twice punished for the same conduct in violation of the double jeopardy clauses of the federal and state constitutions. But as the provisions of G.S. 14-27.4 and G.S. 14-32 plainly show, the crimes that he was convicted of are separate and distinct offenses. Each requires the proof of an element that the other does not; neither is a lesser included offense of the other; and neither the constitution of the state nor nation prohibits one from being punished for committing two separate and distinct offenses in one circumstantial setting. *State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971).

No error.

Judges WELLS and BECTON concur.

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BERRY ANDY LEFLER v. BONNIE S. LEFLER

No. 8713DC1249

(Filed 6 September 1988)

Divorce and Alimony § 30— equitable distribution—equal division—appeal dismissed

Plaintiff's appeal from an order of equitable distribution has no merit where the parties agreed to an equal division of the property; they stipulated that their property consisted of certain items and stipulated as to the value of much of the property; and plaintiff did not except to any of the trial court's findings of fact.

APPEAL by plaintiff from *Wall, Judge*. Judgment entered 6 August 1987 in District Court, COLUMBUS County. Heard in the Court of Appeals 31 May 1988.

This appeal is from an order of equitable distribution. The parties stipulated (a) that their marital property consisted of household furnishings and other personal property, the marital home, and two businesses, Budget Finance Corporation and Shelley-Lefler Insurance Agency, (b) as to the value of much of the personal property, and (c) that an equal division would be equitable. Following a hearing in which value witnesses for each testified the judge evaluated all the properties, determined that they were worth \$314,171.47, distributed the house, its furnishings and certain personal property worth \$99,546.00 to defendant, distributed the businesses and other personal property worth \$214,625.47 to plaintiff, and required him to make four annual equalizing payments to defendant, each in the amount of \$14,384.93.

Ralph G. Jorgensen and Williamson & Walton, by Edward L. Williamson, for plaintiff appellant.

McLean, Stacy, Henry & McLean, by H. E. Stacy, Jr., for defendant appellee.

PHILLIPS, Judge.

Plaintiff's appeal has no legal or logical basis. Though he makes several arguments none of them, or any of his exceptions for that matter, address any of the court's detailed findings of

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fact, some of which must fail for plaintiff's appeal to succeed, since they obviously support the judgment. Instead, though the appeal is from a judicially agreed to equal division of designated articles of marital property, determined by a judge who as finder of fact had the prerogative to determine the credibility and weight of all evidence presented, he makes the following irrelevant, fallacious, and really pointless arguments:

(1) The distribution is not equal because the court failed to take into account the defendant's separate income and estate, including an inheritance received months after the judgment was entered.

(2) The judge erred in requiring him to make the annual equalizing payments to defendant of \$14,384.93 each because his annual disposable income is only \$8,067—as though that excused him from accomplishing the equal division agreed to and justified him keeping two-thirds of the property.

(3) In distributing the property the judge failed to consider the twelve statutory factors stated in G.S. 50-20(c)—though these factors do not have to be considered when an equal division is made, *Spence v. Jones*, 83 N.C. App. 8, 348 S.E. 2d 819 (1986), and how their consideration could have made an equal division more equal he does not say.

(4) The accounting methods of his value witnesses were more reliable and accurate than those of defendant's value witnesses and the court erred in finding to the contrary.

No error in the court's findings of fact having been called to our attention or appearing on the face of the record, the findings are conclusive, *Harris v. Walden*, 314 N.C. 284, 333 S.E. 2d 254 (1985), and since the findings support the conclusions of law and judgment the judgment is affirmed.

Affirmed.

Judges WELLS and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 SEPTEMBER 1988

ADJATEY v. SKINES No. 8818SC4	Guilford (86CVS3428)	No Error
DAVIS v. CITY OF ARCHDALE No. 8719SC274	Randolph (85CVS307)	Affirmed
HOBSON v. CAVE No. 8728SC298	Buncombe (86CVS1276)	Affirmed
HOFFMAN v. SMITH No. 8714SC1040	Durham (84CVS01435)	No error in trial; remanded for amendment of judgment
IN RE STATE v. BEACON INS. CO. No. 8710SC1130	Wake (85CVS444)	Reversed and Remanded
LAMB v. McKESSON CORP. No. 8717SC1195	Rockingham (86CVS388)	Affirmed
MIMS v. N.C. CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMM. No. 8719SC1105	Cabarrus (87CVS0440)	Affirmed
MURDOCK v. EAST COAST OIL No. 874SC1168	Onslow (86CVS898)	Affirmed
SHORE v. BROWN No. 8723SC856	Yadkin (86CVS281)	Affirmed in part; reversed in part
STATE v. GALLIMORE No. 8719SC1252	Randolph (85CRS8317)	No Error
STATE v. HUGHES No. 8717SC1254	Rockingham (87CRS3245) (87CRS3246) (87CRS3247) (87CRS3248) (87CRS3249) (87CRS3250)	Remanded for Resentencing
STATE v. SPENCE No. 8714SC1235	Durham (86CRS12428) (86CRS40780)	No Error
STATE v. TATE No. 8722SC1230	Iredell (87CRS1638) (87CRS2945)	No Error

Jones v. Jefferson and Ireland v. Jefferson and Totten v. Jefferson

MONA W. JONES v. ELGIN JEFFERSON AND MELINDA JEFFERSON, D/B/A
JEFFERSON FAMILY CARE HOME #3

NORMA BIGELOW IRELAND v. ELGIN JEFFERSON AND MELINDA JEFFER-
SON, D/B/A JEFFERSON FAMILY CARE HOME #2

GLADYS B. TOTTEN v. ELGIN JEFFERSON AND MELINDA JEFFERSON, D/B/A
JEFFERSON FAMILY CARE HOME #3

No. 8817DC70

(Filed 20 September 1988)

1. Master and Servant § 8.1— violations of FLSA alleged—findings as to compensation and intent of employer and employees

In an action to recover for alleged minimum wage and overtime violations of the federal Fair Labor Standards Act, the trial court's findings that the salaries and other remuneration paid to the plaintiffs were intended by the defendants to compensate plaintiffs for the first forty hours worked each week were supported by the evidence insofar as those findings related to the periods during which the plaintiffs were employed to work 24-hour shifts, and such findings were not precluded by a stipulation of the parties in their pretrial order that, "The plaintiffs received paychecks on a monthly basis while employed with the defendants, which said checks were to be compensation for all hours worked"; however, the trial judge's findings that the smaller salaries paid to two plaintiffs for working 12-hour shifts were also intended to compensate for forty hours of work per week were unreasonable and unsupported by the evidence.

2. Master and Servant § 10— violations of FLSA alleged—dates of employment—stipulation waived by employer

In an action to recover for alleged minimum wage and overtime violations of the federal Fair Labor Standards Act, defendant employers waived their right to rely on a stipulation regarding dates of employment where ample evidence supporting the trial court's challenged findings was offered at trial by both plaintiffs and defendants, and the evidence was received without any objection by defendants.

3. Master and Servant § 8.1— alleged violations of FLSA—supervisors in group care facilities for the elderly—employees working 24 hours per day—sufficiency of evidence

In an action to recover for alleged minimum wage and overtime violations of the federal Fair Labor Standards Act, evidence was sufficient to support the trial judge's finding that plaintiffs, who were live-in supervisors in defendants' residential group care facilities for elderly people, worked 24 hours per day when employed full time where that finding was based in turn upon other findings by the court that, while on duty, plaintiffs were not allowed to leave the premises; their presence on the premises at all times was for defendants'

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benefit; their sleep was frequently interrupted by the necessity of attending to residents; and they had to pay substitutes from their own resources when they took time off other than their regular allotted time.

4. Master and Servant § 8.1— alleged violations of FLSA—calculation of back wages—consideration of lodging provided by employer

In an action to recover for alleged minimum wage and overtime violations of the federal Fair Labor Standards Act, the trial court erred in its calculations of back wages liability by inconsistently granting credit to defendant employers for lodging provided to one plaintiff but refusing them credit for lodging provided to two other plaintiffs based on its finding that the lodging was "not suitable and adequate" and "not comparable" to plaintiffs' own homes, since the condition of the lodging provided may have been relevant to its value, but the evidence here did not support a finding that the lodging was of no value; there is no requirement that the lodging provided must be comparable to the employee's own home or that there must be an express agreement between employer and employee in order to include the value of lodging in an employee's wages; and the critical issue is whether the benefit is provided primarily for the benefit of the employee.

5. Master and Servant § 8.1— alleged violations of FLSA—insufficiency of good faith belief defense—award of both liquidated damages and prejudgment interest improper

Although defendant employers presented some evidence tending to show that their violation of the Fair Labor Standards Act was in good faith, the trial court found that they had not satisfactorily established a good faith and reasonable belief defense, and it was within the sound discretion of the trial court to award liquidated damages; however, the court could not award both liquidated damages and prejudgment interest.

6. Master and Servant § 8.1— alleged violation of FLSA—test of willfulness—insufficiency of showing—extension of period of limitations improper

The appropriate test for determining whether a violation of the Fair Labor Standards Act is willful is not whether the employer is aware of the possible applicability of the Act but whether the employer knew or showed a reckless disregard for the matter of whether its conduct was prohibited by statute; therefore, in the absence of such evidence of knowledge or reckless disregard in this case, the trial court erred in finding willfulness and in extending the period of limitations to three years based on that finding.

APPEAL by defendants from *Peter M. McHugh, Judge*. Judgments entered out of session and out of county with consent of all parties on 10 February 1987. Heard in the Court of Appeals 1 June 1988.

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*Donaldson, Horsley & Greene, P.A., by Arthur J. Donaldson,
for plaintiff-appellees.*

*Fisher & Phillips, Atlanta, Georgia, by Henry A. Huettner;
and Farmer & Watlington, by R. Lee Farmer, for defendant-ap-
pellants.*

TECTON, Judge.

This appeal arises under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. Sec. 201 *et seq.* Five employees of defendants Elgin and Melinda Jefferson, operators of Jefferson Family Care Homes, brought separate actions against their employers for alleged minimum wage and overtime violations of the FLSA. The cases were consolidated for a bench trial, and judgments from which no appeal has been taken were entered against two of the plaintiffs. The other plaintiffs, Mona W. Jones, Norma Bigelow Ireland, and Gladys B. Totten, were awarded back wages, liquidated damages, prejudgment interest, costs, and attorney fees. From those judgments, the Jeffersons appeal.

The Jeffersons assign error to several findings and conclusions of the trial court relating to the computation of unpaid minimum and overtime wages. They also contest the awards of liquidated damages, prejudgment interest, and attorney fees, as well as the trial court's application of the three-year, rather than two-year, statute of limitations for back wages liability. For the reasons that follow, we vacate the judgments and remand the matter to the trial court for further proceedings.

I

Elgin and Melinda Jefferson operate three licensed "family care homes," which are residential group care facilities for two to five (now six) elderly persons who require some personal services but no continuous medical supervision. Regulations promulgated by the North Carolina Department of Human Resources governing the operation of family care homes require that either the administrator or a "supervisor-in-charge" live in each home full time and be in charge of the home's operation. The regulations also require that responsible staff be on duty at all times to supervise and assist residents with activities such as bathing, dressing, walking, and to evacuate all residents in an emergency.

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Norma Bigelow Ireland testified that she was employed as a live-in supervisor-in-charge at Jefferson Family Care Home #2 from 5 December 1979 to 5 June 1983. Pursuant to an oral agreement with Melinda Jefferson, she was on duty 24 hours a day, seven days a week, with five days off per month and received a monthly salary of \$500 plus room and board. After about a year and a half her salary was raised to \$650 per month, and a year later to \$750 per month.

Mona W. Jones was employed to work twelve-hour shifts at Jefferson Family Care Home #3 from 23 March to 31 August 1983 for \$400 per month, and during that time she had one paid week off. From 1 September 1983 to 24 March 1984, Jones resided on the premises pursuant to an oral contract requiring her to be on duty 24 hours per day with five days off each month, at a monthly salary of \$800.

Gladys Totten also worked at Home #3 pursuant to an oral agreement. From 21 December 1982 to 12 March 1983, she resided on the premises, was on duty 24 hours per day, was entitled to three days off per month, and received a monthly salary of \$750. From 21 March to 5 May 1983, she worked twelve-hour shifts from 7:00 a.m. to 7:00 p.m. at a salary of \$400 per month.

The duties of employment for each plaintiff were substantially the same and, during a twenty-four hour period, included preparing and serving three meals, dispensing medication, helping the residents to bathe and dress, changing linens, doing the residents' laundry, and cleaning the premises. Plaintiffs were not free to leave the premises while on duty. When they took time off in addition to their allotted time, they personally paid substitutes to relieve them.

Personal calendars of the plaintiffs showing the days they worked or paid substitutes were received in evidence. Testimony by each plaintiff describing a typical day's work indicated that work duties occupied almost all waking hours and allowed only brief periods for personal pursuits or relaxation. The court also heard evidence regarding the normal hours of sleep of each plaintiff and indicating that sleep-time was regularly interrupted by the necessity of attending to residents on an average of once per night, or one to two times per night, four or five nights per week.

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The Jeffersons presented testimony that each plaintiff was required by her oral contract to work only five days a week and no more than 20 days per month. When the plaintiffs were hired, they also were told variously that their job duties would require from 6 to 7.5 hours of work per day, that the remainder of their on-duty time they were free to engage in personal activities, and that they could leave the premises anytime by calling the Jeffersons to come and relieve them. In addition, the Jeffersons presented documentary evidence, including calendar records which purported to show the days and hours worked and reported by each employee at the end of each month, and which generally reflected workweeks of fewer than forty hours. Plaintiffs, however, denied having reported their time worked to their employer.

After hearing the evidence, the trial court found that the monthly salaries paid to the plaintiffs were intended by the parties as payment for the first forty hours of work each week; that meals provided to all plaintiffs and lodging provided to Ireland constituted additional compensation; and that plaintiffs worked 24 hours per day when employed full time and 12 hours per day when employed for 12-hour shifts. Based on these and other findings, the court concluded that the Jeffersons had committed minimum wage and overtime violations and awarded back wages to Ireland, Jones, and Totten of \$84,686.08, \$28,216.80, and \$10,412.44, respectively. The court also awarded liquidated damages in like amounts and awarded \$7,378.33 in costs and attorney fees to each plaintiff.

II

In their first four arguments, the Jeffersons allege various errors by the trial court relating to its computations of back wages owed to the plaintiffs. We will address them in order.

A

[1] The Jeffersons first challenge the trial court's findings with respect to each plaintiff that the salaries and other remuneration paid to the plaintiffs were intended by the defendants to, and did in fact, compensate the plaintiffs for the first forty hours worked each week. Specifically, they argue that this finding is unsupported by the record and is precluded by a stipulation of the par-

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ties in their pretrial order that: "The plaintiffs received paychecks on a monthly basis while employed with the defendants, which said checks were to be compensation for all hours worked."

Under the FLSA, an employer is required to pay his employees who are "engaged in commerce" a minimum hourly wage of \$3.35, 29 U.S.C. Sec. 206(a)(1), and must compensate them for time worked in excess of forty hours per week, *i.e.*, "overtime," at one and a half times their regular rate of pay. 29 U.S.C. Sec. 207(a)(1). The regular hourly rate of pay for a salaried employee is "computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. Sec. 778.113(a) (1987). (Emphasis supplied.) In accordance with his finding that the remuneration paid to the plaintiffs was intended to compensate them for forty hours per week, the trial judge calculated the regular hourly rate by reducing the various monthly salaries to their weekly equivalents, see 29 C.F.R. Sec. 778.113(b); adding in the values of meals and lodging, in accordance with 29 C.F.R. Sec. 778.116; and dividing by forty. The result was then multiplied by one and a half to arrive at the appropriate overtime pay rate. In some instances, the computation of the regular rate produced a figure lower than minimum wage so that the court then awarded the difference necessary to bring the rate to minimum wage for those weeks and computed overtime at one and a half times the minimum wage.

The Jeffersons contend their stipulation means that the monthly salaries represented "straight-time" compensation for all hours worked by plaintiffs, however many or few. Then, relying on 29 C.F.R. Sec. 778.114, a rule governing employees who receive a fixed salary for fluctuating hours, they maintain that the trial court should have computed overtime at one-half the rate produced by dividing the salaries by all hours actually worked in a given workweek. Plaintiffs, on the other hand, argue that the stipulation simply means they were paid by the month rather than some other time period.

In construing a stipulation, a court should not extend its terms beyond that which fair construction justifies. *Noble v. Noble*, 18 N.C. App. 111, 196 S.E. 2d 62 (1973).

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. . . Stipulations will receive a reasonable construction so as to effect the intentions of the parties, but in ascertaining the intentions of the parties, the language employed in the agreement will not be construed in such a manner that a fact which is obviously intended to be controverted is admitted or that a right which is plainly not intended to be waived is relinquished.

Outer Banks Contractors, Inc. v. Forbes, 302 N.C. 599, 604-605, 276 S.E. 2d 375, 380 (1981). In doubtful cases, appellate courts strongly incline toward the construction adopted by the trial court. 73 Am. Jur. 2d *Stipulations* Sec. 7 (1974).

In our view, the stipulation in question may not be fairly construed to amount to an agreement by the parties to be governed by the "fluctuating hours" provisions of 29 C.F.R. Sec. 778.114. It appears from the record that the method of determining the regular rate of pay for purposes of computing overtime is a matter which was intended to be controverted at trial. Moreover, it also appears that, throughout the trial, the parties disagreed about the intended meaning of the stipulation. The trial judge apparently adopted the plaintiffs' narrower interpretation, and we cannot say, based on the record before us, that that decision was clearly erroneous.

The question for our resolution thus becomes whether the court's "forty-hour" findings are supported by any competent evidence in the record. If so, the findings are conclusive on appeal. See, e.g., *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979).

Melinda Jefferson testified at trial and in her deposition that the plaintiffs were told the job could require approximately six to seven hours of work per day, that they were never expected to put in over 35 to 40 hours per week, and that they were entitled to additional pay if they had to get up at night to attend to a resident. In addition, her deposition testimony included a concession to the effect that an additional payment at time and a half would have been required for time worked beyond forty hours in a week. In our view, this evidence is adequate to support the trial judge's finding that the salaries constituted wages for a work-week of forty hours, at least insofar as that ruling relates to the periods during which the plaintiffs were employed to work

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24-hour shifts. However, Mrs. Jefferson's testimony seems to relate solely to the amount of work required during a 24-hour period. Under these circumstances, we find unreasonable and unsupported by the evidence the judge's findings that the smaller salaries paid to plaintiffs Jones and Totten for working 12-hour shifts were also intended to compensate for forty hours of work per week. We therefore remand the matter with instructions to the trial court to hear further evidence concerning the amount of time intended to be compensated by the salaries paid, to revise its findings as necessary, and to recalculate the regular hourly rate, the unpaid overtime, and the unpaid minimum wages, if any, due to the plaintiffs.

B

[2] The Jeffersons next contend that the trial court erred in its findings of fact regarding the dates of employment of plaintiffs Jones and Totten because these findings do not comport with dates of employment to which the parties stipulated in their pretrial order. Stipulations are binding judicial admissions which dispense with and substitute for the necessity of legal proof and which ordinarily remain in effect through the duration of the controversy. *In re Johnson*, 70 N.C. App. 383, 320 S.E. 2d 301 (1984). However, in this case, ample evidence supporting the court's challenged findings was offered at trial by both the plaintiffs and the Jeffersons and was received without any objection by the Jeffersons. Consequently, we conclude that the Jeffersons, by failing to object or to assert the stipulation, have waived their right to rely on the stipulated employment dates. See, e.g., *Hamco Oil and Drilling Co. v. Ervin*, 354 P. 2d 442 (Okla. 1960); 73 Am. Jur. 2d, *Stipulations* Sec. 12 (1974). This assignment of error is overruled.

C

[3] By their next argument, the Jeffersons challenge the trial judge's finding that the plaintiffs worked 24 hours per day when employed full time. That finding was based, in turn, upon other findings by the court that, while on duty, the plaintiffs were not allowed to leave the premises; that their presence on the premises at all times was for the defendants' benefit; that their sleep was frequently interrupted; that they had to pay substitutes from their own resources when they took time off other than their

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regular allotted time; and that the defendants acquiesced in and countenanced this procedure.

The Jeffersons contend the "24-hour" finding is not supported by the evidence and urge this Court alternatively to find the existence of an express or implied agreement for six to seven hours of work each day, to make an independent determination of the compensable hours of work, or to simply overturn the finding and remand to the trial court for a new determination of the hours worked. We decline to adopt any of these alternatives.

It is not the role of this Court to weigh the evidence and substitute our own findings for those of the trial court. Although the question of the *sufficiency* of the evidence to support the findings may be raised on appeal, the trial court's findings of fact are conclusive and binding on appeal if supported by competent evidence, even though the evidence might sustain findings to the contrary. *E.g., In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984).

The standard for proving compensable hours worked, in actions under the FLSA, was enunciated by the United States Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 90 L.Ed. 1515 (1946). Under *Anderson*, an employee sustains his burden of proof ". . . if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687, 90 L.Ed. at 1523. The burden then shifts to the employer to produce "evidence of the precise amount of work performed or . . . evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88, 90 L.Ed. at 1523. Absent such evidence, "the court may then award damages to the employee even though the result be only approximate . . ." *Id.* at 688, 90 L.Ed. at 1523.

Pointing to evidence that the plaintiffs slept, ate meals, and engaged in a few other personal pursuits, the Jeffersons contend the finding that the plaintiffs worked 24 hours a day for days or weeks at a time is unreasonable. They rely for support upon 29 C.F.R. Sec. 785.23 which states:

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not con-

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sidered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own

However, the trial court found facts in accordance with evidence presented by the plaintiffs tending to show that they did not in fact enjoy periods of complete freedom from all duties or freedom to leave the premises and, thus, did not fall within the circumstances contemplated by this regulation. Moreover, it is well-established that idle time such as time spent in eating, sleeping, or other personal activities may constitute compensable work time, if it is spent predominantly for the employer's benefit, and that whether the time primarily benefits the employer or the employee is a factual question dependent upon all of the circumstances of the case. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 89 L.Ed. 124 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 89 L.Ed. 118 (1944). This Court specifically held, in *Lowe v. Bell House, Inc.*, 74 N.C. App. 196, 328 S.E. 2d 301 (1985), that sleep time which was interrupted by a call to duty on an average of two or three times a week for between one-half hour and one hour, constituted compensable work time because the frequency of interruptions established the night hours on call were "spent predominantly for the employer's benefit."

The trial judge resolved the key factual question in this case by concluding that all plaintiffs' on-duty time was spent primarily for their employer's benefit. We are satisfied the plaintiffs have carried their burden of proof by presenting documentary and testimonial evidence estimating their average working schedule from which the trial judge was able to reasonably approximate the hours worked and by demonstrating that, due to the frequency with which their sleep was interrupted, even their sleep time was spent predominantly for their employer's benefit. The rebuttal evidence offered by the defendant was not found to be credible by the trial court, and we are not persuaded by their arguments on appeal that the inferences drawn by the Court from the plaintiffs' evidence are clearly erroneous. The Jeffersons' challenges to the court's computation of compensable hours are overruled.

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D

[4] The Jeffersons further contend that the trial court erred in its calculations of back wages liability by inconsistently granting credit to them for lodging provided to plaintiff Ireland but refusing them credit for lodging provided to Jones and Totten. We agree.

Section 203(m) of the FLSA allows a credit to an employer for "the reasonable cost . . . of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees" In this case, while crediting the Jeffersons for meals provided to all plaintiffs, the trial judge denied credit for lodging supplied to Jones and Totten based on findings that their sleeping quarters were "not suitable and adequate" and "not comparable" to their own homes, and that no agreement existed between them and the defendants that lodging would be considered additional salary.

The evidence shows that each of the plaintiffs, while residing on the premises full time, was provided a furnished upstairs bedroom for her use, although each also maintained another residence elsewhere. Although there is evidence that the room provided at Home #3 and occupied successively by Totten and Jones was initially poorly furnished and unattractive, the Jeffersons later made improvements to the room, and it was in fact used by the plaintiffs and their families. In our opinion, while the condition of the lodging provided may be relevant to its value, the evidence in this case does not support a finding that the lodging was of no value. Moreover, we find no authority for the proposition that the lodging provided must be comparable to the employee's own home or that there must be an express agreement between employer and employee in order to include the value of lodging in an employee's wages. Rather, the critical issue is whether the benefit is provided primarily for the benefit of the employee. See *Laffey v. Northwest Airlines, Inc.*, 642 F. 2d 578 (D.C. Cir. 1980). Because we detect no reasonable basis for the trial court's decision not to count as wages the reasonable costs of lodging provided to Jones and Totten while they resided on the premises full time, we direct the trial court, in recalculating back wages liability on remand, to include such costs in the computation of their wages.

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III

[5] We now turn to the Jeffersons' contention that the trial court erred by awarding the plaintiffs liquidated damages and prejudgment interest.

Section 216(b) of the FLSA imposes upon an employer who violates the Act liquidated damages in an amount equal to the liability for unpaid minimum wages or overtime. However, 29 U.S.C. Sec. 260 further provides that:

if the employer shows to the satisfaction of the court that the act or omission giving rise to [the] action [for unpaid wages] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation . . . the court may, in its sound discretion, award no liquidated damages (Emphasis supplied.)

Although the Jeffersons presented some evidence tending to show that their violation of the FLSA was in good faith (including evidence they believed from having performed the job themselves that it required no more than six to seven hours of work per day, that they were unaware of the long hours being worked, and that the plaintiffs never demanded any overtime pay until the lawsuits were filed), the trial court found that the Jeffersons had not satisfactorily established a good faith and reasonable belief defense. As an appellate court, we may not reassess the credibility of the evidence. Moreover, even when the evidence does support a good faith defense, it remains within the sound discretion of the trial court whether to award or deny liquidated damages. See, e.g., *Peters v. City of Shreveport*, 818 F. 2d 1148 (5th Cir. 1987), cert. dismissed, --- U.S. ---, 99 L.Ed. 2d 264 (1988). Our review of the record reveals no clear abuse of that discretion and, accordingly, we hold that the award of liquidated damages was not error. However, upon remand, the amounts should be adjusted by the court to reflect the recalculation of back wages due to the plaintiffs.

As for the prejudgment interest award, the Jeffersons correctly contend, and the plaintiffs concede that, in a proceeding under the FLSA, a court may not award both liquidated damages and prejudgment interest. See, e.g., *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 89 L.Ed. 1296 (1945); *Spagnuolo v. Whirlpool*

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Corp., 641 F. 2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860, 70 L.Ed. 2d 158 (1981). Therefore, the award of prejudgment interest is reversed.

IV

[6] We next address the Jeffersons' claim that the trial court erred by applying a three-year statute of limitations.

Pursuant to 29 U.S.C. Sec. 255(a), the statute of limitations for a cause of action under the FLSA is two years "except that a cause of action arising out of a *willful* violation may be commenced within three years" Based on a conclusion that the Jeffersons' violations were willful, the trial court extended the limitations period to three years, resulting in the award of an additional year's back wages to plaintiff Ireland, whose suit was instituted by filing of a summons on 31 August 1984.

Although the judgment does not reveal what standard the court used in assessing willfulness, it appears that the court based its ruling upon a finding that the Jeffersons knew the FLSA applied to them and their employees. The Jeffersons contend, and we agree, that the court thereby committed a reversible error of law.

Although at the time this case was tried the federal circuit courts held conflicting views concerning the appropriate test for willfulness for purposes of this statute, the United States Supreme Court recently has resolved the question. In *McLaughlin v. Richland Shoe Co.*, --- U.S. ---, 100 L.Ed. 2d 115 (1988), the court rejected a standard that would require only that the employer be aware of the possible applicability of the FLSA, and held that an employer has not committed a willful violation unless it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* at ---, 100 L.Ed. 2d at 123.

Because we conclude that the *Richland Shoe* standard is the appropriate one for determining willfulness, and because we find no evidence in the record that the Jeffersons, during the employment of the plaintiffs, actually knew or showed reckless disregard for whether they were violating the FLSA, we conclude the trial court erred by extending the limitations period to three years. Therefore, that part of the judgment awarding back wages to

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plaintiff Ireland for any period prior to 31 August 1982 is reversed.

V

Finally, contending they were never afforded an opportunity to contest the reasonableness of the amounts awarded, the Jeffersons assign error to the awards of costs and attorney fees. The judgments were entered, by consent of all the parties, out of session and out of the county more than seven months after the trial. The plaintiffs apparently submitted affidavits supporting their claims for attorney fees and costs to the court sometime after trial. The Jeffersons claim they were never served with copies of the affidavits or otherwise given notice of the amounts claimed. Because we are unable to discern from the record whether the Jeffersons did in fact have proper notice of those claims, we direct the trial court on remand to resolve that question, and if appropriate, to afford the Jeffersons an opportunity to voice their objections to the amounts awarded.

VI

For the foregoing reasons, the judgments appealed from are vacated and this cause is remanded to the trial court for further proceedings consistent with this opinion.

Vacated and remanded.

Judges WELLS and PHILLIPS concur.

LEO TABORN v. CLEVELAND HAMMONDS, AS SUPERINTENDENT OF THE DURHAM CITY SCHOOLS, AND DURHAM CITY BOARD OF EDUCATION

No. 8714SC1070

(Filed 20 September 1988)

1. Schools § 13.2 – reduction in funding – justifiable decrease in teaching positions – evidence required

In order to establish a justifiable decrease in the number of teaching positions due to reduced funding under N.C.G.S. § 115C-325(e)(1)(l), defendant board of education must present evidence justifying the decrease in teaching positions beyond the mere fact that funding has been reduced. In this case,

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defendant board failed to establish a justifiable decrease in the number of teaching positions for emotionally handicapped students because of decreased funding for the 1984-85 school year where the record does not explain how defendant reached the decision to reduce personnel.

2. Schools § 13.2— teacher dismissal—reduction in force policy

A city board of education followed its reduction in force policy in the midyear dismissal of plaintiff as a teacher of emotionally handicapped students after funds for the Exceptional Children Program were reduced.

3. Schools § 13.2— teacher dismissal—no equitable estoppel

Defendant board of education was not equitably estopped from dismissing plaintiff as a teacher of emotionally handicapped students in the middle of the school year after funds for the Exceptional Children Program were reduced.

Judge WELLS dissenting.

APPEAL by plaintiff from *Stephens, Judge*. Judgment entered 31 July 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 30 March 1988.

This appeal is the second appeal of this case to this Court. In *Taborn v. Hammonds*, 83 N.C. App. 461, 350 S.E. 2d 880 (1986) (hereinafter *Taborn I*), this Court vacated and remanded an appeal from an administrative decision by the defendant Durham City Board of Education (hereinafter the Board) to discharge plaintiff, Leo Taborn, a teacher in an Emotionally Handicapped classroom, during the middle of a school year. This Court found in *Taborn I* that the Board's decision to terminate plaintiff was not supported by the evidence and remanded the case for a new hearing consistent with N.C.G.S. § 150A-51 (recodified by § 150B-51, effective 1 January 1986) and the Board's policy regarding reduction in personnel. This Court further held that plaintiff received a fair and impartial hearing, and that the departure of a board member during the hearing and absence during the Board's deliberations did not deny him due process of his right to a fair tribunal. *Taborn v. Hammonds*, 83 N.C. App. at 472, 350 S.E. 2d at 886-87.

The facts surrounding plaintiff's firing and the Board's subsequent actions are set forth in *Taborn I* at 462-64, 350 S.E. 2d at 881-82 and only those facts relevant to this decision will be discussed. Pursuant to this Court's remand, plaintiff received a letter from defendant Cleveland Hammonds, Superintendent of Durham City Schools, dated 10 February 1987 explaining the basis of plaintiff's dismissal.

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As a result of a teacher audit by the North Carolina Department of Public Instruction in 1984, the Durham City Schools were not funded for the 1984-85 school year for the number of positions which were previously filled in our system for the Exceptional Children program. In order to adjust to this decrease in funding, it was necessary to take various actions. Insofar as these actions were to affect teachers within the system, I followed the Durham City Schools' policy regarding Reduction in Instructional Personnel. A copy of this policy is attached to this letter and incorporated herein for your reference.

At my direction a committee reviewed all available records of the teachers in the Exceptional Children program against the responsibility of the system to provide a meaningful educational program to our pupils. After determining that the system was retaining teachers properly certified and qualified in the areas to be serve[d], significant factors in the selection for dismissal were the extent of educational credentials and teaching experience in the North Carolina Public Schools. In reviewing your credentials it was determined that you had the lowest certification level, A, and the least amount of previous teaching experience in the North Carolina Public Schools. I also determined that a qualified and experienced teacher was available to transfer into the position which you were teaching. For these reasons your name was included among those whom I recommended to the Board for dismissal no sooner than the end of the first semester of that school year.

On 25 February 1987, the Board held a second administrative hearing and concluded:

1. That the decrease in funding for the Exceptional Children Program . . . was based on a corrected head count [according to State and Federal funding guidelines].
2. That this constituted a justifiable decrease in funding; and a reduction in professional staff was an appropriate response to this decrease.
3. The Board policy regarding Reduction in Instructional Personnel and State law were followed in making the selec-

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tion of which members of the professional staff were to be recommended for dismissal.

4. That the recommendation of the Superintendent that Leo Taborn be dismissed is substantiated by the preponderance of evidence [and ratified by the Board].

The trial court upheld the Board's decision, and found that the Board sufficiently explained the basis upon which plaintiff was terminated, that Board policy was followed, and that a rational basis existed between plaintiff being fired and the Board's decision.

Plaintiff appeals on three grounds: (1) that the Board did not establish a justifiable decrease in the number of teaching positions for emotionally handicapped students because of decreased funding in the 1984-85 school year; (2) that the evidence at the second hearing did not support the findings that plaintiff was discharged according to Board policy; and (3) that the Board is equitably estopped from discharging plaintiff.

Glenn & Bentley, P.A., by Stewart W. Fisher, attorney for plaintiff-appellant.

Spears, Barnes, Baker, Hoof & Wainio, by Marshall T. Spears, Jr. and Gary M. Whaley, attorneys for defendant-appellees.

ORR, Judge.

I.

[1] Plaintiff's first argument is that the Board did not establish a justifiable decrease in the number of teaching positions because of decreased funding in the 1984-85 school year. We agree.

N.C.G.S. § 115C-325(e)(1) states:

No career teacher shall be dismissed or demoted . . . except for one or more of the following:

. . .

1. A justifiable decrease in the number of positions due to district reorganization, decreased enrollment, or decreased funding

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N.C.G.S. § 115C-325(m)(1) makes subsection (e) applicable to probationary teachers dismissed during the school year.

In *Taborn I*, this Court noted an "absence of findings regarding the relationship of headcounts in areas of the Exceptional Children Program to the termination of plaintiff . . ." *Taborn v. Hammonds*, 83 N.C. App. at 469, 350 S.E. 2d at 885, and that the Board's decision did not specify in which areas the staff reductions occurred.

In the case *sub judice*, the Board made detailed findings of fact, including the following:

That because of the aforementioned loss of funds [\$58,560.00 in the Title VI-B program and \$211,150.72 in the State Aid Exceptional Children program], the Exceptional Children Program, which had been staffed in reliance upon the initial proposed allotments, did not have sufficient funds for personnel expenses to pay all the professional . . . persons who had originally been assigned to said program for the 1984-85 school year.

That at the request of the Superintendent and in accordance with Board policy, the Director of Exceptional Children and the Director of Instruction reviewed and made recommendations for consolidation and elimination of positions to serve the 1984-85 Exceptional Children Program enrollment within the State guidelines without detriment to the system's obligation to provide the most meaningful educational program to its students in accordance with its policy on Reduction in Instructional Personnel.

That is what was recommended and approved that six aide positions be eliminated in non-self contained classes, that one teaching position be eliminated from the Speech Language Therapy Service, that two teaching positions be eliminated from the Academically Gifted, that one EMH teaching [position] be eliminated from Burton Elementary, that one EMH position be eliminated from Holton Middle, and that one EMH resource services position be consolidated for the Fayetteville Street and Y. E. Smith Elementary Schools.

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While these findings of fact provide an adequate explanation for reducing specific personnel, they do not justify the initial decision culminating in a decrease in the number of positions in the Exceptional Children's Program.

The threshold issue that must be determined under N.C.G.S. § 115C-325(e)(1) is whether decreased funding automatically justifies a decrease in teaching positions. As we stated in *Taborn I*, our legislature expressly intended to protect teachers in special education programs and related areas from a reduction in funding. *Taborn v. Hammonds*, 83 N.C. App. at 466, 350 S.E. 2d at 883. The purpose of N.C.G.S. § 115C-325 *et seq.* (known as the Teacher Tenure Act, formerly N.C.G.S. § 115-142 *et seq.*) is "to provide teachers of proven ability . . . [protection] from dismissal for political, personal, arbitrary or discriminatory reasons." *Bennett v. Bd. of Education*, 69 N.C. App. 615, 619-20, 317 S.E. 2d 912, 916, *cert. denied*, 312 N.C. 81, 321 S.E. 2d 893 (1984) (citation omitted).

Upon learning of the decreased funding, defendants' conclusion was to reduce teaching positions. In light of the requirement for a "justifiable decrease in the number of positions" under N.C.G.S. § 115C-325(e)(1)(l) and the purpose of the Teacher Tenure Act discussed above, we conclude that the automatic decision to reduce teaching positions as the response to the funding cut is precisely the kind of decision from which our legislature intended to protect teachers.

It should be further noted that the Board's conclusions refer to a "justifiable decrease in funding" and that the "reduction in professional staff was an *appropriate* response." The statutory test in N.C.G.S. § 115C-325(e)(1)(l) is "[a] justifiable decrease in the number of positions" not a justifiable decrease in funding and an appropriate response.

The record before us does not explain how defendants reached the decision to reduce personnel. The only alternative defendants explored was to spread the reduction in funding over a two year period. We believe defendants adequately explained their reasons for not selecting this alternative, and we do not take issue with this decision.

However, there is little discussion regarding other alternatives defendants may have had. Richard F. Barber (Assistant Su-

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perintendent of Business) testified that he only looked at personnel costs involved in the program to project the extent of the budget deficit. There was no testimony regarding consideration of other costs involved in administering the specific program or other programs, nor was there information concerning the entire budget's inclusion of teaching salaries, administrative costs, overhead costs, supplies and other personnel. Barber further testified that teachers' salaries are paid by local funds, and that "[i]f sufficient funds were approved [by the county commissioners] we could cover additional personnel." He did not testify regarding any request for additional funds.

While the record is unclear on the entire budgetary process, it is clear that the money lost was not earmarked for specific teaching positions. Barber later testified that there was a surplusage in the Durham City School budget in June 1984. The record does not reflect why the reduction was not absorbed within the entire budget or spread throughout the city school system.

Dr. Kenneth Warlick (Supervisor for Programs for Exceptional Children) testified that when he determined that the headcount total had been overestimated for that school year, he was instructed to draft a proposal to consolidate or eliminate positions and still maintain quality. Warlick further testified that they (Durham City Schools) had to reduce positions because of a reduction in funds.

Defendant Hammonds then testified that after Dr. Warlick and the committee made certain investigations, he (Warlick) made recommendations to consolidate or eliminate certain positions. The testimony is simply incomplete on the issue of why a decrease in funds allocated to a particular program *automatically* resulted in a reduction of teaching positions for that program.

Therefore, we hold that to establish a justifiable decrease in the number of positions due to decreased funding under N.C.G.S. § 115C-325(e)(1)(l), defendants must present evidence justifying the decrease in teaching positions beyond the mere fact that funding has been reduced. Black's Law Dictionary defines justifiable as "[r]ightful; defensible; [or] . . . that which can be shown to be sustained by law . . ." Black's Law Dictionary 778 (rev. 5th ed. 1979).

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In *Taborn I*, this Court "recognize[d] that program decisions are entirely within the expertise of the Durham City Board of Education, and we do not seek to nor deem it wise or allowable under the law of this state for us to interpose our judgment in these matters." *Taborn v. Hammonds*, 83 N.C. App. at 471, 350 S.E. 2d at 886. We emphasize that we are not interposing our judgment for that of the Board. The public policy of this state, as expressed in N.C.G.S. § 115C-325, allows defendants to eliminate teaching positions because of decreased funding only if justified. See *Taborn v. Hammonds*, 83 N.C. App. 461, 350 S.E. 2d 880.

If defendants can justify their decision to eliminate positions, we defer to their judgment in determining which positions to eliminate in any particular program providing they follow the statutory requirements. Defendants must always meet the initial requirement of justifying the decrease in positions before discharging any teacher covered by this statute.

Accordingly, this issue must be remanded once again to the Board for a new hearing consistent with this opinion.

II.

[2] Plaintiff next argues that the evidence at the second hearing did not support a finding that he was discharged according to Board policy.

N.C.G.S. § 150A-51 (recodified by § 150B-51(b), effective 1 January 1986) prescribes our scope of review:

The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or

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- (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

Under subsection (5), the standard of review is the "whole record" test. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, *Universal Camera Corp.*, *supra*. On the other hand, the 'whole record' rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Id. at 410, 233 S.E. 2d at 541.

In *Abell v. Nash County Bd. of Education*, 71 N.C. App. 48, 321 S.E. 2d 502 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 389 (1985), this Court followed the "general rule that 'arbitrary' or 'capricious' reasons are those without any rational basis in the record, such that a decision made thereon amounts to an abuse of discretion." 71 N.C. App. at 52-53, 321 S.E. 2d at 506. Relying on *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 28 L.Ed. 2d 136 (1971), the *Abell* Court ruled that a "reviewing court must be able to determine what factors were used to reach an administrative decision as well as whether said decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law." *Taborn v. Hammonds*, 83 N.C. App. at 466, 350 S.E. 2d at 883, *citing*, *Abell v. Nash County Bd. of Education*, 71 N.C. App. at 53, 321 S.E. 2d at 507.

In the case *sub judice*, the Board made the following findings of fact:

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That only two teachers had left the program due to normal attrition such as retirement, resignation, and leave of absence as must be considered in accordance with the Policy on Reduction in Instructional Personnel; therefore, it was necessary to determine which teachers would teach the remaining classes, and which teachers would be recommended for termination from employment.

That the Director of Exceptional Children and the Director of Instruction reviewed the qualifications, certification, evaluations and experience of all the professional staff in the Exceptional Children Program in order to make the necessary reductions to bring the personnel more in line with the funding available for said program.

That respondent, Leo Taborn, had the lowest level of certification, an A certificate, and the least amount of experience, zero years of experience, of any teacher in the entire Exceptional Children Program.

That Leo Taborn had no evaluation in his file as teacher. There was an evaluation in his file as an Aide. Although the evaluation in his file as an Aide was considered, because of the distinctions between the duties of an Aide and as a Teacher, it was not controlling in making the determination to recommend the termination of Leo Taborn.

That although the emotionally handicapped students were not miscounted, the recommendations from the Director of the Exceptional Children Program for reduction of positions and personnel did not result in the failure of the students in the 1984-85 school year being served appropriately; further, the various categories of exceptional children to be served in one school year often necessitate changes in teaching capacities from the prior year.

That funds are not allocated for sub-groups in the Exceptional Children Program but for the Exceptional Children's Program as one entity.

We must now apply the "whole record" test and determine if it supports the Board's conclusion that:

The Board policy regarding Reduction in Instructional Personnel and State law were followed in making the selec-

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tion of which members of the professional staff were to be recommended for dismissal.

The Board based its decision on the following policy:

POLICY REGARDING REDUCTION
IN INSTRUCTIONAL PERSONNEL

When it has been decided that there shall be a reduction in the number of teachers or principals employed in the system, the following criteria shall be used in determining which individuals shall be dropped from employment:

- a) To the extent possible, the decrease shall be met by normal attrition such as retirement, resignation, leave of absence, etc.
- b) The requirements of the system to provide the most meaningful educational program to its pupils.
- c) The qualifications and experience of the individuals being reviewed in relation to the position(s) to be filled.
- d) The previous evaluations which have been made concerning the individuals being reviewed.
- e) If other considerations are substantially similar, a career teacher shall be given preference in retention over a probationary teacher.

In *Taborn I*, the transcript of the hearing revealed "inconsistent and contradictory testimony . . . as to the weight each criterion in the Board's policy is to be given and as to how they were relied on . . ." *Taborn v. Hammonds*, 83 N.C. App. at 469, 350 S.E. 2d at 885.

Here, Dr. Warlick testified on direct examination:

Q. When you began to look at the individuals, did you review and follow the policy regarding the reduction of forces?

A. Yes, it was followed exactly all five steps.

Q. Looking at it now from December 1984, January 1985, put your place back in time, back to the future and at that

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time had there been a decrease in normal attrition, retirement, leave of absence to take care of these reductions?

A. To take care of the reductions.

Q. And the positions?

A. There were two instances, we had one individual that was on a leave of absence and we had a teacher working with the gifted program who was substituting for that individual.

. . .

Q. These two positions was all that was taken care of due to normal attrition in the first step of the reduction in force?

A. Right.

On cross-examination, Dr. Warlick admitted that his committee did not make projections in the normal attrition rate for the 1984-85 or 1985-86 years. He explained (on redirect) that even if he knew who was going to resign at the end of the 1984-85 school year, it would not save money during the year in question.

It is clear from Dr. Warlick's and defendant Hammonds' testimony that Dr. Warlick's committee considered the normal attrition rate before moving to the next criteria. Both Dr. Warlick and Hammonds testified that although normal attrition (criteria (a)) was applied first, the rest were given equal weight in their decision process.

The next three criteria, meaningful educational program, qualifications and experience of the individuals and previous evaluations, were considered together and adequately addressed by the committee.

We have thoroughly reviewed the whole record and hold that there was no "contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Board of Education*, 292 N.C. at 410, 233 S.E. 2d at 541. There is nothing in the record that indicates plaintiff was a victim of a "last hired first fired" approach that this Court was concerned with in *Taborn I*. *Taborn v. Hammonds*, 83 N.C. App. at 470, 350 S.E. 2d at 885.

Further, we hold that the Board's decision to terminate Taborn, once they determined that teaching positions would be

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decreased, was not arbitrary, capricious or an abuse of discretion. *Abell v. Nash County Bd. of Education*, 71 N.C. App. at 52-53, 321 S.E. 2d at 506. There is extensive evidence to support the Board's efforts in determining which teachers to terminate, and that the Board followed its policy regarding reduction in personnel.

III.

[3] Plaintiff next contends that his firing was illegal under the doctrine of equitable estoppel. This issue was not raised in the first appeal, during the second hearing or on appeal to the court below.

The Supreme Court of North Carolina has stated that "[we] will not decide questions which have not been presented in the courts below" *White v. Pate*, 308 N.C. 759, 765, 304 S.E. 2d 199, 203 (1983), citing, *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E. 2d 204 (1972). See also *Childers v. Hayes*, 77 N.C. App. 792, 336 S.E. 2d 146 (1985), disc. rev. denied, 316 N.C. 375, 342 S.E. 2d 892 (1986) (contentions not raised at trial may not be raised for the first time on appeal).

Even if this issue were properly before this Court, there is insufficient evidence to support a finding of equitable estoppel.

Plaintiff excepts to the finding that his contract "contained a provision that State supported positions are subject to the allotment of personnel and funds from the State Board of Education and a further provision . . . if the position . . . is terminated, the contract shall be terminated. The duties of each employee were to be as assigned by the Superintendent."

This finding of fact is correct and so stated in plaintiff's contract. The problem is that plaintiff's position was not terminated; plaintiff was terminated. There was no reduction in the number of positions in his specific area. The reduction was in the entire Exceptional Children Program in which plaintiff was employed.

For the reasons set forth in I. above, we reverse and remand for a new hearing.

Affirmed in part, reversed in part, and remanded.

Judge PARKER concurs.

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Judge WELLS dissents.

Judge WELLS dissenting.

My review of the whole Record convinces me that the Record supports the Durham City Board of Education's decision to terminate plaintiff's employment as a teacher; that its decision was not made upon unlawful procedure nor affected by any other error of law; and that its decision was not arbitrary or capricious. I therefore respectfully dissent from Part I of the majority opinion and vote to affirm the judgment of the Superior Court.

WILLIAM JAMES CHANDLER AND MYRA R. CHANDLER v. U-LINE CORPORATION v. EATON CORPORATION

No. 8726SC922

(Filed 20 September 1988)

1. Uniform Commercial Code § 14— valve in ice maker—warranty of fitness for particular purpose—sufficiency of evidence of defect

In an action to recover for damages allegedly caused by a leaking ice maker in a refrigerator manufactured by defendant where defendant filed a third-party complaint against the manufacturer of a valve used in the ice maker, the trial court properly denied the valve manufacturer's motion for directed verdict on the breach of warranty of merchantability issue since the evidence was sufficient to show that the valve was defective in design and thus was not fit for the ordinary purpose for which it was used, and the evidence presented a jury question as to whether the leakage was due to the design of the valve or whether it was caused by overtightening at the refrigerator manufacturer's plant. N.C.G.S. § 25-2-814.

2. Trial § 43— foreman's mistake in writing down jury verdict—jurors' testimony admissible

The trial court erred in excluding under N.C.G.S. § 8C-1, Rule 606(b) jurors' evidence of a mistake in writing down the jury's verdict, since that rule makes it clear that a juror may not testify as to any matter occurring during the course of deliberations, but the evidence in question in this case dealt with a clerical error rather than a matter occurring during deliberations, and the evidence did not concern the mental processes involved in the jury's determination; however, the trial judge could not reform the verdict of the jury where the evidence of the alleged clerical error in recording the verdict did not come to the attention of the court until several days after the jury was discharged, and the trial court therefore had no authority to reform the verdict or to reassemble the jury.

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3. Trial § 43— mistake in recording verdict—testimony by only two jurors insufficient to support new trial order

The evidence of only two of the jurors rather than all twelve that there was a mistake in the recording of the verdict was as a matter of law insufficient to support an order for a new trial. N.C.G.S. § 1A-1, Rule 59(b).

APPEAL by third-party defendant Eaton Corporation and defendant and third-party plaintiff U-Line Corporation from *Allen (C. Walter), Judge*. Judgment entered 27 January 1987 and order entered 26 February 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 February 1988.

W. James Chandler and Brian deBrun for plaintiff-appellees.

Jones, Hewson & Woolard, by Harry C. Hewson and Hunter M. Jones, for defendant-appellant U-Line Corporation.

Petree Stockton & Robinson, by J. Neil Robinson, for defendant-appellant Eaton Corporation.

GREENE, Judge.

This is an action in which plaintiffs sue defendant U-Line Corporation (hereinafter "U-Line") for damages which plaintiffs allege were caused by a leaking ice maker in a refrigerator manufactured by U-Line. The leak occurred when a plastic portion of a valve cracked while plaintiffs were away from their home on vacation and caused extensive damage to the home.

Plaintiffs brought causes of action sounding in strict liability, negligence, and breach of express and implied warranties. Defendant U-Line denied liability in its answer and filed a third-party complaint alleging any damage for which it was found liable was caused by a defective valve manufactured by Eaton Corporation (hereinafter "Eaton").

Eaton answered and denied liability. At trial, plaintiffs sought to show that an over-tightening of a brass nozzle connected to the valve caused stress which resulted in the fracture. U-Line and Eaton both sought to show the leak was caused by water freezing in the valve. They alleged the freezing was due to plaintiffs failing to properly heat the area of their home where the refrigerator was located. At the close of plaintiffs' and U-Line's evidence, Eaton moved for a directed verdict against

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U-Line on the breach of warranty issue. The trial judge denied this motion.

At the close of all the evidence, the jury retired with the following five issues:

1. Did Defendant U-Line Corporation expressly warrant to the Plaintiffs William James Chandler and Myra R. Chandler that the icemaker (sic) was fit for the ordinary purposes for which such icemaker (sic) was intended?

2. Did Defendant U-Line Corporation impliedly warrant to the Plaintiffs William James Chandler and Myra R. Chandler that the icemaker (sic) was fit for the ordinary purposes for which such icemaker (sic) was intended?

3. Was the warranty breached by Defendant U-Line Corporation?

4. Did Third-Party Defendant Eaton Corporation impliedly warrant to Defendant U-Line Corporation that the valve was fit for the ordinary purposes for which such valve was intended?

5. Was the warranty breached by Third-Party Eaton Corporation?

After the jury finished deliberating, it returned to the courtroom and handed its verdict to the clerk. The verdict sheet indicated the jury answered "Yes" to each of the five issues. The jury was then generally polled as follows:

[CLERK]: Will the members of the jury please stand? Ladies and gentlemen of the jury, you have answered the issues as follows: Number one, "Yes"; Number Two, "Yes"; Number Three, "Yes"; Number Four, "Yes"; and Number Five, "Yes." Was this your verdict, so say all of you?

"Yes."

The jury was then dismissed and judgment was entered for the stipulated amount of \$15,596.57 in favor of plaintiffs and U-Line.

On 30 January 1987, Eaton's counsel, Neil Robinson, telephoned one of the members of the jury, James Freeman, to obtain a general critique of Robinson's presentation of Eaton's case. Dur-

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ing the conversation, and on his own volition, Freeman informed Robinson that the jury foreman, Howard Pugh, had made a mistake in writing down the answer to Issue Five on the verdict sheet. Issue Five concerned whether Eaton had breached the warranty to U-Line. Freeman told Robinson that the jury had voted "No" on this issue but Pugh had inadvertently written down "Yes." Freeman indicated he brought this mistake to Pugh's attention after the trial judge had excused the jury but Pugh indicated that because the jury had been dismissed, he did not think there was anything that could be done.

Robinson then telephoned U-Line's counsel and told him that he was going to contact Pugh about the alleged mistake. Robinson telephoned Pugh and told Pugh what Freeman had related. Pugh indicated that he had made an error but did not realize it until after the trial judge had dismissed the jury and it was called to his attention by several jurors in the hallway outside the courtroom. He also indicated that he did not tell the trial judge of the mistake because he thought there was nothing that could be done about it at that stage.

On 2 February 1987, Eaton made a motion pursuant to N.C.G.S. Sec. 1A-1, Rules 59 and 60 asking the court to reform the answer to Issue Five to reflect the jury's actual verdict or, in the alternative, to grant a new trial on that issue. Attached to the motion were affidavits from Freeman and Pugh relating the information which they had previously given to Robinson. At a hearing on 12 February 1987, Freeman and Pugh testified and reiterated the matters contained in their affidavits. U-Line objected to the court's consideration of the affidavits and testimony.

The trial judge sustained U-Line's objections to the evidence of the jurors pursuant to N.C.G.S. Sec. 8C-1, Rule 606(b) (1983) and denied Eaton's motions. Eaton appeals to this Court arguing the trial judge should have granted its motion for a directed verdict on the warranty issue, or alternatively, should have considered the jurors' testimony and reformed the verdict or granted a new trial.

This case presents the following issues: I) whether the trial judge erred in denying Eaton's motion for a directed verdict concerning the breach of the implied warranty of merchantability;

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and II) whether the trial judge erred in excluding the jurors' evidence of a mistake in recording the verdict.

I

In determining whether evidence is sufficient to survive a motion for directed verdict, the trial court must consider all evidence in the light most favorable to the non-movant, and give that party the benefit of all reasonable inferences arising from the evidence. *Murray v. Murray*, 296 N.C. 405, 250 S.E. 2d 276 (1979). However, evidence which only raises a possibility or conjecture of fact is not sufficient to withstand a motion for a directed verdict. *Ingold v. Carolina Power and Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971).

In order to survive a motion for directed verdict in an action for breach of the implied warranty of merchantability under N.C. G.S. Sec. 25-2-314, the purchaser must present sufficient evidence to show:

[F]irst that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods were defective at the time of sale; third, that the injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result. . . . The burden is upon the purchaser to establish a breach by the seller of the warranty of merchantability by showing that a defect existed at the time of the sale.

Morrison v. Sears, Roebuck and Co., 319 N.C. 298, 301, 354 S.E. 2d 495, 497 (1987) (citations omitted) (quoting *Cockerham v. Ward*, 44 N.C. App. 615, 624-25, 262 S.E. 2d 651, 658, *disc. rev. denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980)). Eaton does not argue the valve was not subject to the implied warranty of merchantability but maintains there was no evidence that a defect in the valve caused the damage and even if there was a defect U-Line failed to show the defect existed at the time of the valve's sale from Eaton to U-Line.

A

[1] The evidence at trial tended to show that Eaton designed and manufactured the plastic valve. This valve allowed water into

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the ice maker once a tray of ice had been made and deposited. A line providing water to the ice maker was connected to the valve by means of a brass nozzle. This connection took place at U-Line's plant. Plaintiff's expert, Dr. Norman Cope, gave inconsistent answers concerning his opinion of whether a defect in the Eaton valve caused the leak. Initially, Cope testified the over-tightening of the brass nozzle to plastic threads located on the valve caused stress which weakened the valve and eventually led to breakage along the threads. Cope also stated that the type of break in the valve indicated that leakage might not occur immediately upon connection to a water source.

However, Cope later testified upon viewing the valve on the stand that he noticed for the first time that only two threads on the valve were mating with the nozzle and that this was insufficient to give a secure fitting. He went on to testify that the threads on the plastic valve were not properly designed for the brass nozzle. On cross-examination by Eaton, in response to a question about whether the design of the valve caused the leakage, Cope testified "Not that I have been able to see."

Nevertheless, immediately thereafter, when cross-examined by U-Line, Cope testified as follows:

Q. [U-Line] In other words, the fact that this plastic part was designed, if it was, for the hose connector with only two threads engaging would, in your opinion, add to the stress and contribute to the failure that you found?

A. [Cope] That would be the theoretical outlook on that.

Q. Well that, you are the expert. That's your testimony, isn't it?

A. Yes.

While Cope's testimony is certainly subject to differing inferences, it is well settled that conflicts in the evidence must be resolved in favor of the non-movant in a motion for a directed verdict. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979). Furthermore, evidence in favor of the non-movant must be taken as true, *Snow v. Duke Power Co.*, 297 N.C. 591, 256 S.E. 2d 227 (1979), and credibility of testimony is for the jury. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). Viewing the evidence in the

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light most favorable to U-Line, we hold it was sufficient to show that the valve was defective in that it was not fit for the ordinary use for which it was used. *See N.C.G.S. Sec. 25-2-314(2)(c)* (1986) ("Goods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used . . .").

B

Eaton also contends there was not sufficient evidence to demonstrate the valve was defective at the time of the sale by Eaton to U-Line. However, Cope's testimony was that the defect was in the *design* of the valve for the brass fitting, rather than in the manufacture of the valve itself. His testimony that the design of the valve with only two threads could have contributed to the failure was sufficient to show the valve was not fit for the ordinary purposes for which it was used. Cope further testified that the valve in question was identical to a design diagram drawn by Eaton and entered into evidence at trial. Therefore, it was for the jury's determination as to whether the leakage was due to an inadequate number of threads on the valve or whether it was caused by over-tightening at U-Line's plant.

II

Eaton next argues the trial judge erred in excluding the jurors' evidence of a mistake in writing down the jury's verdict. Affidavits from two jurors indicated the jury unanimously voted to answer "No" to the issue of Eaton's breach of warranty but that the foreman mistakenly wrote "Yes" on the verdict sheet. Eaton argues this evidence was admissible and therefore the trial judge, after accepting this evidence, should have corrected the verdict and entered judgment for Eaton, or alternatively, granted a new trial.

A

[2] In the present case, the trial judge ruled the juror evidence inadmissible under N.C.G.S. Sec. 8C-1, Rule 606(b). Whether evidence of the jury foreman's error in writing down the verdict was excluded by Rule 606(b) is a question of law. Although a motion for a new trial is normally addressed to the sound discretion of the trial judge, where the trial judge acts based on an error in law, his decision is reviewable. *See Smith v. Price*, 315 N.C. 523, 533, 340 S.E. 2d 408, 414 (1986); *Selph v. Selph*, 267 N.C. 635, 638,

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148 S.E. 2d 574, 577 (1966); *see also Britt v. Allen*, 291 N.C. 630, 635, 231 S.E. 2d 607, 611 (1977). If the juror evidence was admissible, the trial judge should have considered it in determining whether to grant a new trial, reform the verdict, or allow the jury's decision to stand.

Rule 606(b) provides:

(b) *Inquiry into validity of verdict or indictment.*—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Id.

The general rule of exclusion renders inadmissible testimony concerning mental processes of jurors or testimony about any matter or statement occurring during deliberations unless it fits the two stated exceptions. *Id.* comment. While there are few North Carolina cases interpreting Rule 606(b), the rule is identical to its federal counterpart. Federal interpretations of the rule are of course in no way binding on this court; however, the rules were not adopted in a vacuum and federal cases may be looked to for assistance in determining the intent of the General Assembly in adopting the rules. N.C.G.S. Sec. 8C-1, Rule 102 comment.

The reasons for the general rule of exclusion in Rule 606(b) are: (1) to prevent harassment of jurors by the defeated party in an effort to discover misconduct sufficient to set aside the verdict, *Tanner v. United States*, 483 U.S. ---, 97 L.Ed. 2d 90, 105-06, 107 S.Ct. 2739, 2747 (1987) (citing *McDonald v. Pless*, 238 U.S. 264, 267-68, 59 L.Ed. 1300, 1302, 35 S.Ct. 783, 784 (1915)); (2) the government's interest in insulating the jury's deliberative process,

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id.; (3) preventing the disruption of the finality of the process, *id.*; and (4) dissuading tampering of the process by preventing fraud by individual jurors who could remain silent during deliberations and later assert they were influenced by improper considerations, *United States v. Eagle*, 539 F. 2d 1166, 1170 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977); see also *Government of Virgin Islands v. Gereau*, 523 F. 2d 140, 148 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).

However, weighed against these policies are the wrongs visited on the losing party where there is an error in the rendition of a verdict. See *McDonald*, 238 U.S. at 268, 59 L.Ed. at 1302, 35 S.Ct. at 784-85. As such, flat application of the exclusionary rule may be unjust in certain circumstances.

Recognizing that wholesale exclusion of juror evidence might create unjust results, the drafters of Rule 606(b) created certain limited exceptions to the general rule. However, the facts of this appeal present neither of the stated exceptions: the case of extraneous prejudicial information which is improperly brought to the jury's attention or the case of outside influence which was improperly brought to bear upon any juror. Therefore, we must determine whether Rule 606(b) excludes evidence of errors made in the recording of the verdict.

Federal authorities have generally held juror evidence concerning a mistake in the transmission of a verdict is not excludable under the rule. See, e.g., *Attridge v. Cencorp Div. of Dover Tech. Intern., Inc.*, 836 F. 2d 113 (2d Cir. 1987) (admissibility of juror testimony hinges upon purpose for which it is offered); *United States v. Dotson*, 817 F. 2d 1127 (5th Cir. 1987) (affidavit of juror is admissible to show verdict was not that actually agreed upon); *Young v. U.S.*, 163 F. 2d 187 (10th Cir. 1947), cert. denied, 332 U.S. 770 (1947) (prior testimony admissible to show that through inadvertence or mistake verdict announced was not the one on which agreement had been reached); see also 3 J. Weinstein and M. Berger, Weinstein's Evidence par. 606[04] at 606-40 (1987); Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court under Rule 606(b)*, 57 Neb. L. Rev. 920, 958 (1978) (recognizing that the erroneous reporting of a verdict is one of the most likely post-deliberative occurrences not excluded by Rule 606(b) which may be proved by testimony of jurors).

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We believe the federal courts are correct in their interpretations. The rule makes clear that a juror may not testify as to any matter occurring *during the course of deliberations*. Here, the proffered evidence concerned matters occurring *after* deliberations and did not fall within the rule's general exclusion. The evidence dealt with a clerical error, rather than a matter occurring during deliberations. Furthermore, the evidence did not concern the mental processes involved in the jury's determination. Therefore, we hold the trial judge erred in excluding the evidence under Rule 606(b). See Rule 606 comment ("Allowing [jurors] to testify as to matters other than their own innerreactions involves no particular hazard to the values" Rule 606 seeks to protect); Rule 601 (stating that every person is competent as a witness except as otherwise provided in the rules); cf. *State v. Costner*, 80 N.C. App. 666, 671, 343 S.E. 2d 241, 244 (testimony concerning what jury foreman said and how jury voted on his inquiries excluded under Rule), *disc. rev. denied*, 317 N.C. 709, 347 S.E. 2d 444 (1986).

B

We must nonetheless determine if the evidence of the jurors is prohibited by other North Carolina law. There are some evidence questions that are not within the coverage of the rules of evidence. N.C.G.S. Sec. 8C-1, Rule 102 comment. In these instances, North Carolina precedents continue to control unless changed by our courts. *Id.*

In this regard our courts have consistently held that the general rule prohibiting jurors from impeaching their own verdict, *Stone v. Baking Co.*, 257 N.C. 103, 106, 125 S.E. 2d 363, 365 (1962), does not prevent the reception of evidence from jurors on the issue of whether a clerical error was made by the jury in recording their verdict. *McCabe Lumber Co. v. Beaufort County Lumber Co.*, 187 N.C. 417, 418, 121 S.E. 755, 756 (1924) ("the agreement reached by the jury, and not the written paper filed, is the verdict"); *Bundy v. Sutton*, 207 N.C. 422, 427, 177 S.E. 420, 422 (1934) (a jury may correct its verdict when verdict does not correctly express the actual agreement of the jurors). Upon receipt of such evidence, the trial judge, if the jury has not been discharged, may permit juries to reassemble and correct their verdicts. *Mitchell v. Mitchell*, 122 N.C. 332, 333, 29 S.E. 367 (1898).

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Such a procedure is "essential to securing a fair trial and a correct verdict." *Cole v. Laws*, 104 N.C. 651, 657, 10 S.E. 172, 174 (1889). However, if the jury has been discharged, the trial court is without authority to reassemble the jury to correct a verdict. *Livingston v. Livingston*, 213 N.C. 797, 799, 197 S.E. 597, 598 (1938). Accordingly, we reject the argument of Eaton that the trial judge erred in not reforming the verdict of the jury. The evidence of the alleged clerical error in recording the verdict did not come to the attention of the court until some several days after the jury was discharged and therefore the trial court had no authority to reform the verdict or to reassemble the jury.

C

[3] We nonetheless must consider whether the evidence of the two jurors is sufficient to support a motion for a new trial pursuant to N.C.G.S. Sec. 1A-1, Rule 59(9) (1983). That statute provides:

(a) *Grounds*—a new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

....

(9) Any other reasons heretofore recognized as grounds for a new trial.

N.C.G.S. Sec. 1A-1, Rule 59(9) (1983).

We believe Rule 59(9) authorizes the trial judge to grant a new trial where, after the jury has been discharged, there comes to the attention of the court that an error has occurred in the recording of the jury verdict. See *Selph*, 267 N.C. at 637, 148 S.E. 2d at 575 (trial judge has discretion to set aside a jury verdict when "it would work injustice to let it stand"); *Walston v. Greene*, 246 N.C. 617, 99 S.E. 2d 805, 806 (1957) (affirming grant of new trial where trial judge set aside verdict because "justice and equity" required him to do so). However, the trial judge must exercise great caution in setting aside a jury verdict and granting a new trial and should in no event grant such motion unless

.... the verdict as announced or delivered is different—and all of the jurors agree that it is different—from the verdict as assented to in the jury room at the time of voting . . .

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8 Wigmore on Evidence Sec. 2355, p. 718-19 (emphasis added). See *Britten v. State*, 567 S.W. 2d 64 (1978) (the affidavits of eleven of twelve jurors was not sufficient to establish an unanimous mistake in recording the verdict of the jury); *Angelina Casualty Co. v. Spencer*, 310 S.W. 2d 682 (1958) (testimony of one juror that there was a clerical mistake in rendering the jury verdict was not conclusive and new trial properly denied); *Setzer v. Latimer*, 40 Ga. App. 247, 149 S.E. 281 (1929) (new trial allowed where affidavits of all jurors were offered as evidence in support of motion for new trial); *Caylat v. Houston E. & W. T. Ry. Co., et al.*, 113 Tex. 131, 252 S.W. 478 (1923) (jury verdict set aside and new trial ordered on basis of affidavits of all twelve jurors that foreman made error in recording the verdict).

Here, while the motion for a new trial including the affidavits of the two jurors was made within ten days of the judgment as required by Rule 59(b), we hold the evidence of only two of the jurors that there was a mistake in the recording of the verdict is as a matter of law insufficient to support an order for a new trial. Accordingly, there was no error committed by the trial court in denying Eaton's motion to set aside the verdict and declare a new trial.

III

Because we have declined to order a new trial, we need not reach the merits of defendant U-Line's appeal.

For the reasons stated, we affirm the trial court's denial of Eaton's motion for a directed verdict and the denial of Eaton's motion for a new trial.

Affirmed.

Judge WELLS concurs.

Judge EAGLES concurs in the result.

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MARK R. COMAN, PLAINTIFF-APPELLANT v. THOMAS MANUFACTURING CO., INC., DEFENDANT-APPELLEE

No. 8822SC218

(Filed 20 September 1988)

Master and Servant § 10.2— employee “at will”—wrongful discharge—employee’s refusal to violate federal regulations—failure of employee to state claim

An employee whose contract is not for a definite term does not state a tort cause of action for wrongful discharge against his employer when he claims that the sole reason for his discharge is his refusal to violate federal Department of Transportation regulations, since such employee has a federal remedy, and creation of such a cause of action might be contrary to North Carolina’s employment “at will” doctrine.

Judge WELLS dissenting.

APPEAL by plaintiff, Mark R. Coman, from *Ross (T. W.)*, Judge. Judgment entered 25 January 1988 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 7 September 1988.

In this civil action plaintiff seeks damages from the defendant Thomas Manufacturing Co. for wrongfully terminating his employment. Defendant moved to dismiss the complaint pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure for failure to state a claim upon which relief could be granted. After a hearing on the motion an order was entered dismissing the complaint against the defendant, from which the plaintiff appeals. Plaintiff’s complaint contains the following allegations of fact:

In 1978 plaintiff began working part time as a long distance truck driver for defendant Thomas Manufacturing Co., Inc. In 1984 he became a full-time employee. It was plaintiff’s responsibility to make long distance trips in vehicles owned by the defendant for the purpose of transporting raw materials and finished manufactured goods to various points outside North Carolina. Federal regulations promulgated by the Department of Transportation require all private motor carriers, including defendant Thomas Manufacturing Co., to keep safety records concerning the route traveled, mileage and length of service of each driver. The regulations provided that no driver of a regulated carrier may drive a vehicle for longer than a ten-hour shift which is to be followed by a rest period of not less than eight hours. Each

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driver is required by the regulations to maintain accurate and complete logs of all travel on behalf of any regulated carrier.

Plaintiff alleged that he was required to make several long distance trips each week on behalf of the defendant. In order to complete the assigned number of trips plaintiff was required to drive in excess of the time allowed by the regulations of the federal Department of Transportation. Further, plaintiff alleged that he was required by defendant to make false reports of the number of hours driven in order to provide evidence that his driving hours were in compliance with the Department of Transportation regulations. When Thomas Manufacturing informed plaintiff that he would be required to drive in excess of the number of hours prescribed in the regulations, plaintiff refused to work except in compliance with the Department of Transportation regulations. Defendant then terminated the plaintiff's employment or, at least, threatened to reduce plaintiff's pay by fifty percent (50%) if plaintiff refused to work in violation of the federal regulations. Plaintiff alleged that the sole reason for his dismissal was his refusal to drive except in compliance with Department of Transportation regulations.

Larry L. Eubanks and David F. Tamer for plaintiff appellant.

Petree, Stockton & Robinson, by W. R. Loftis, Jr. and Penni P. Bradshaw, for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in dismissing his complaint for failure to state a claim on which relief can be granted. As the defendant made the motion pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim on which relief can be granted, the allegations of the complaint set forth above must be taken as true for purposes of this appeal. *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E. 2d 282, 288, 79 A.L.R. 3d 651, 659 (1976). Facts as presented by the complaint raise this question for appeal: Does an employee whose contract is not for a definite term state a tort cause of action for wrongful discharge against his employer when he claims that the sole reason for his discharge is his refusal to violate federal Department of Transportation regulations? For the reasons set out below we find that there is no such cause of action. We affirm the ruling of the trial court.

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We note at the outset that the federal regulations in question are part of a statutory scheme to promote safe roads and include "whistleblower protections." See 49 U.S.C.A. App. § 2305 (1988). Thus, were we to create a state tort remedy for the violation of the Department of Transportation regulations it would be in addition to an existing federal remedy.

I. The "At Will" Doctrine in North Carolina

Plaintiff makes no claim to being other than an "at will" employee. The "at will" doctrine has been explained by the N. C. Supreme Court in this way: "[w]here a contract of employment does not fix a definite term, it is terminable at the will of either party, with or without cause, except in those instances in which the employee is protected by a statute." *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E. 2d 282, 288 (1976) (citations omitted); *accord, Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). The "at will" doctrine in North Carolina is a departure from the English Common Law which presumed a hiring for one year. Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. Rev. 631, 640 (1988); Parker, *The Uses of the Past: The Surprising History of Terminable-at-Will Employment in North Carolina*, 22 Wake Forest L. Rev. 167, 176 (1987). In 1877 the English Common Law presumption was firmly supplanted by an American Rule announced in the 1877 treatise of Horace Gray Wood: "[w]ith us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will . . . [It] is an indefinite hiring and is determinable at the will of either party." H. Wood, *A Treatise on the Law of Master and Servant* § 134, at 272 (1877). The rule reflects a nineteenth century view which strongly supported complete freedom of contract. It allows employers freedom to hire and fire freely according to production and other economic needs. Leonard, 66 N.C.L. Rev. 631, 641.

In his brief plaintiff admits that he is an "at will" employee but asserts that a North Carolina employer is not free to discharge an "at will" employee in bad faith and cites *Haskins v. Royster*, 70 N.C. 601 (1874), and the more recent case, *Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E. 2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 490 (1985), in support of his argument.

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Haskins concerned a third party's interference with an employment contract. The plaintiff employer sued the defendant for luring two sharecroppers away from his employ. In his defense the defendant claimed that the contract between the plaintiff and the employee sharecroppers was unlawful. The Court did not find an unlawful contract and found the defendant liable for unlawful interference of a contract.

Coman, plaintiff in the present case, asks us to rely on dictum in *Haskins* to find a bad faith exception to the "at will" doctrine. Subsequent to its finding that the defendant Royster was liable the *Haskins* Court stated:

It is not necessary to decide what would be the effect of such a stipulation in an action on the contract between the parties to it. But as there seems to be some misconception of the law of such a case . . . a few observations will more conveniently lead us to the question actually presented.

Haskins at 608. With that introduction the Court then reviews some case law and concludes that the contract between the plaintiff Royster and his sharecroppers was lawful. In conclusion the *Haskins* Court stated:

It is important however to notice, that none of these authorities goes to the length of holding, that if after the contractors had duly performed all or part of the work, the plaintiff had *mala fide*, or without lawful cause, discharged them, they could not recover on the contract.

Haskins at 610. We do not agree with plaintiff that the above-quoted passage is central to the holding in *Haskins* and, therefore, we are unable to rely on it to find an exception to the well-established employment "at will" doctrine in North Carolina.

Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E. 2d 282, 79 A.L.R. 3d 651 (1976), is a more recent example of the N. C. Supreme Court's application of the "at will" doctrine, and is an instructive comparison to *Haskins* as it also concerns interference of a third party with an employment contract. In *Smith*, the plaintiff had been president and stockholder of Cloverdale, a Ford automobile dealership. Plaintiff became involved in a dealer's alliance which Ford Motor Company disapproved of, and, as a result, Ford successfully influenced Cloverdale to terminate the

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plaintiff's employment by threatening to terminate Cloverdale's franchise. *Id.* at 88, 221 S.E. 2d at 293. The Court found that Smith had a cause of action for wrongful interference of his contract rights against Ford Motor Co., but held that because he was an "at will" employee he had absolutely no recourse against his employer, Cloverdale. The Court states, "Cloverdale committed no breach of its contract even if, as the plaintiff alleges, there was not 'just cause' for such termination." *Id.* at 80-81, 221 S.E. 2d at 288. This was so even though Cloverdale had allowed itself to be influenced by the wrongful behavior of Ford, and even though there could have been no wrong accomplished against Smith without the help of Cloverdale. The Court screened the employer from liability despite its acquiescence in Ford's alleged malicious interference in the employment contract. *Id.* at 85, 221 S.E. 2d at 290.

Though we recognize that Cloverdale's privilege to discharge Smith for "no just cause" can be distinguished from a dismissal based on an employee's refusal to violate federal regulations or, that is, a dismissal for "bad cause," our research reveals that North Carolina has loyally supported a virtually unqualified privilege regarding the hiring and firing of employees. *Nantz v. Employment Sec. Comm'n*, 290 N.C. 473, 226 S.E. 2d 340 (1976) (labor market analyst alleged wrongful discharge based upon lack of evidence to support her termination); *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971) (schoolteacher alleged wrongful discharge based on discharge being arbitrary and without cause); *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964) (lumber company manager alleged wrongful discharge in breach of employer's promise of permanent job for so long as manager's work was satisfactory); *Willard v. Huffman*, 247 N.C. 523, 101 S.E. 2d 373 (1958) (court recognized employee stated cause of action for wrongful discharge if motivating reason for dismissal was retaliation for unionizing activities); *Scott v. Burlington Mills Corp.*, 245 N.C. 100, 95 S.E. 2d 273 (1956) (weaver alleged wrongful discharge following manufacturer's decision to make example of weaver by firing him and thus coerce other weavers whose records were poorer than that of fired weaver); *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436 (1943) (jewelry store salesman alleged wrongful discharge after employer induced salesman to leave former job with promises of permanent employment); *Elmore v. Atlantic Coast Line R.R.*, 191 N.C.

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182, 131 S.E. 633, 43 A.L.R. 1072 (1926) (railroad conductor alleged wrongful discharge when railroad had relied on what later turned out to be false and malicious allegations of conductor's dishonesty as basis for discharge).

II. Exceptions to the "At Will" Doctrine

Plaintiff in his brief asks us to consider the following language in *Sides v. Duke Hospital* in support of his argument that this Court recognize a cause of action for wrongful discharge in his case:

Thus, while there may be a right to terminate a contract at will for no reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to encourage and prevent. We hold, therefore, that no employer in the State, notwithstanding that an employment is at will, has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case, as plaintiff alleges happened here.

Sides v. Duke Hospital, 74 N.C. App. 331, 342, 328 S.E. 2d 818, 826, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 490 (1985). Plaintiff in his brief recognizes, but dismisses without explanation, cases subsequent to *Sides* in which this Court has maintained that *Sides* is to be read narrowly, its significance limited specifically to the issue of perjury in legal proceedings. See *Trought v. Richardson*, 78 N.C. App. 758, 762, 338 S.E. 2d 617, 619 (1986); *accord*, *Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 370 S.E. 2d 423 (1988) (cause of action recognized when plaintiff alleged firing occurred because of truthful testimony at unemployment compensation hearing). We are unable to dismiss these precedents so lightly.

In *Trought*, plaintiff, a nurse supervisor, alleged that she was discharged in retaliation for her unwillingness to assign work to nurses under her supervision in violation of the state Nursing Practices Act. *Trought* at 762, 338 S.E. 2d at 619. In *Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986), this Court held

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that an employer was free to discharge a waitress at the behest of a chef whose sexual advances had been resisted, even when it was held that the complaint sufficiently alleged a cause of action for the intentional infliction of emotional distress against both the chef and the employer, and possible violations of Title VII of the Civil Rights Act of 1964. *Id.* at 499, 340 S.E. 2d at 126. Though the public policy rationale enunciated in *Sides* speaks in broad terms this Court refused to recognize a tort cause of action in either *Hogan* or *Trought* or in the more recent case, *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 363 S.E. 2d 215, disc. rev. denied, 322 N.C. 111, 367 S.E. 2d 910 (1988), because the *Sides* holding is limited specifically to instances where an employer attempts to interfere with testimony in a legal proceeding. *Accord, Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 370 S.E. 2d 423 (1988).

Coman alleges in his complaint that in order to continue in his job at the same compensation he would have had to violate federal regulations that require him to keep an accurate log of his driving hours. 49 U.S.C. § 3102, 49 C.F.R. § 395.1(a), 395.3(a)(1)(2). The federal regulations at issue are part of a comprehensive federal scheme to ensure motor carrier safety. Tandem Truck Safety Act, Pub. L. No. 98-554, 1984 U.S. Code Cong. & Admin. News (98 Stat.) 4785-96. The regulations provide that if Coman were to make false reports in connection with his duties he would be liable to prosecution. 49 C.F.R. § 395.8(e).

This Court has recognized a tort cause of action against an employer only when an exception to the "at will" doctrine has been created by our legislature which specifically gives an employee a right to sue an employer for retaliatory discharge. See G.S. 95-81 and 95-83 (denial of employment by reason of labor union membership prohibited); G.S. 95-25.20 (discharge for filing Wage and Hour Act complaint prohibited); G.S. 95-130(8) (discharge for filing OSHA complaint prohibited); G.S. 97-6.1 (discharge for filing worker's compensation claim prohibited); G.S. 96-15.1 (discharge in retaliation for testimony at an Employment Security Hearing prohibited).

This Court has never squarely decided whether the rule enunciated in *Smith*, that an "at will" employment contract "is terminable at the will of either party, with or without cause, ex-

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cept in those instances in which the employee is protected by statute," *Smith*, 289 N.C. at 80, 221 S.E. 2d at 288 (1976) (citations omitted), includes the protection of federal statutes. But in a recent case, *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 363 S.E. 2d 215, *disc. rev. denied*, 322 N.C. 111, 367 S.E. 2d 910 (1988), the issue was addressed by this Court. *Burrow* concerned a retaliatory discharge claim by a driver against a private interstate motor carrier. In his first claim the driver charged that he was fired in retaliation for pursuing worker's compensation benefits. This claim was recognized by the Court under G.S. 97-6.1. In his second claim the plaintiff claimed wrongful discharge because of his refusal to drive in violation of federal Department of Transportation regulations. In reviewing this second claim, which was raised for the first time on appeal, the Court questioned whether the issue was properly before it. Assuming though that it was, the *Burrow* Court went on to state "we find no authority for and decline to adopt, plaintiff's argument that violation of a federal regulation creates an exception to the employment at will doctrine in North Carolina." *Id.* at 354, 363 S.E. 2d at 220.

While we recognize the strong public policy interests which support the federal motor carrier safety regulations, we also noted at the outset of this opinion that these interests are protected by federal statute:

No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

49 U.S.C.A. App. § 2305(b) (1988). The remedy provided by the statute is to file a complaint within one hundred eighty days of the alleged violation with the Secretary of Labor. 49 U.S.C.A. App. § 2305(c) (1988).

In light of the federal remedy, we do not see that it is necessary or efficient for this Court to create a state tort cause of

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action in this case, particularly where the creation of such a cause of action may be contrary to our State's employment "at will" doctrine. For these reasons we affirm the dismissal of plaintiff's action for failure to state a claim on which relief can be granted.

Affirmed.

Chief Judge HEDRICK concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

While the majority opinion thoughtfully and faithfully follows a well-established case law path, I find the public policy implications in this case to be as compelling as those enunciated in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E. 2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 490 (1985). It is unnerving to me to contemplate that by sustaining the trial court we may be suggesting to employers of long-distance truck drivers that it is not a violation of the public policy of this state for them to require their drivers to violate federal safety statutes. I, therefore, vote to overrule the trial court and to say that we should recognize the claim for relief asserted by the plaintiff in this case.

SUSAN ELAINE JONES BROWN v. JAMES DAVID BROWN

No. 8718DC1242

(Filed 20 September 1988)

1. Injunctions § 13— no primary action—preliminary injunction inappropriate

The trial court erred in entering a preliminary injunction preventing defendant from discussing his grievances with plaintiff's neighbors, friends, and co-workers, since there was no primary action to which the preliminary injunction could attach.

2. Husband and Wife § 13— separation agreement—defendant as "defaulting party"—no finding to that effect—no attorney fees for plaintiff

The trial court properly denied plaintiff's request for attorney fees based on her contention that defendant materially breached the parties' separation agreement and, by its terms, was responsible as the "defaulting party" for the

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payment of attorney fees, since the trial court dismissed plaintiff's cause of action for rescission of the separation agreement based on material breach by defendant; plaintiff did not appeal that ruling; and there was no specific finding of fact by the trial court that defendant violated the separation agreement.

Judge PHILLIPS concurring in the result.

APPEAL by defendant from *William L. Daisy, Judge*. Order entered 22 September 1987 in District Court, GUILFORD County. Heard in the Court of Appeals 31 May 1988.

Petree, Stockton & Robinson, by W. Thompson Comerford, Jr., Lynn P. Burleson, and Leon H. Lee, Jr., for plaintiff-appellee.

White and Crumpler, by G. Edgar Parker and Robin S. Boden, for defendant-appellant.

BECTON, Judge.

This is a domestic case in which plaintiff, Susan Elaine Jones Brown, sought injunctive and other relief for alleged violations by defendant, James David Brown, of a non-molestation clause contained in the parties' separation agreement. Mr. Brown appeals from the entry of a preliminary injunction prohibiting him from engaging in certain harassing conduct toward Mrs. Brown. We vacate.

I

Mr. Brown and Mrs. Brown were married on 25 November 1982. One child was born to the marriage. They separated on 1 March 1986. On 21 April 1986, the parties entered into a consent order and a separation agreement. The consent order approved a waiver of alimony by Mrs. Brown, awarded child custody and child support to Mrs. Brown, and established visitation privileges for Mr. Brown. The separation agreement detailed the property settlement, included a non-molestation clause, and outlined remedies for breach of the agreement. The separation agreement was not incorporated into the consent order.

On 6 January 1987, Mr. Brown filed a "Motion to Divide Undivided Marital Property and to have Facts Relative to Consent Order Established and Preserved," by which he sought to have the court divide photographs of the minor child and establish for the record certain circumstances existing at the time the consent order was issued.

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On 4 February 1987, following a hearing, District Court Judge J. Bruce Morton ordered that Mr. Brown's motions be dismissed, pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, and that Mrs. Brown be awarded attorney fees, pursuant to Rule 11. In his order, Judge Morton made findings of fact and conclusions of law that purported to incorporate by reference the separation agreement, but the judgment portion of the order made no mention of the incorporation. Mr. Brown gave notice of appeal but never perfected his appeal of this order.

Subsequently, on 1 June 1987, Mrs. Brown filed a motion in the cause in which she alleged that Mr. Brown had contacted many of her professional associates as well as her employer, complaining about the visitation privileges and the payment of child support, and questioning Mrs. Brown's fitness for her job. He also contacted Mrs. Brown, threatening her with continued harassing behavior unless she agreed to lower the amount of child support, and he distributed to Mrs. Brown's neighbors, to members of her church, and to her co-workers copies of a "flyer" listing various grievances.

In her motion, Mrs. Brown prayed that the court: (1) hold Mr. Brown in contempt of court for violating the non-molestation clause in the separation agreement; (2) enter a temporary restraining order; (3) enter a preliminary injunction prohibiting him from communicating with Mrs. Brown, her friends and associates, and the minor child; (4) find Mr. Brown's behavior to be a material breach of the separation agreement; (5) rescind both the separation agreement and the consent order, and institute equitable distribution of the marital assets; and (6) award Mrs. Brown reasonable attorney fees. That same day, Judge Morton issued a temporary restraining order and an order to show cause in the contempt proceeding.

On 24 June 1987, Mr. Brown filed a response to Mrs. Brown's motion which included a Rule 12(b)(6) motion to dismiss for failure to state a claim, and on 25 June 1987, a hearing was held before District Court Judge William L. Daisy. On 2 July 1987, Judge Daisy entered an order which, among other things, dismissed Mrs. Brown's motion to hold Mr. Brown in contempt of court and dismissed her motion to invalidate the separation agreement. The court found that neither the order signed and entered on 4 Feb-

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ruary 1987 nor any other order in the lawsuit incorporated the separation agreement, and that the terms of the separation agreement thus were not enforceable by contempt of court proceedings. However, the trial court did order that Mrs. Brown's motion for a preliminary injunction enjoining Mr. Brown from communicating with various third parties and from contacting the minor child be heard and determined.

At the hearings, Mr. Brown made motions for dismissal pursuant to Rule 41(b) at the conclusion of Mrs. Brown's evidence and again at the close of all the evidence. Both were denied. On 22 September 1987, Judge Daisy entered an order denying Mrs. Brown's motion for a preliminary injunction prohibiting Mr. Brown from exercising visitation privileges with the minor child, but granting her motion for a preliminary injunction enjoining him from communicating with various third parties under certain conditions. The judge also denied both parties' requests for attorney fees.

Mr. Brown now appeals, arguing that the trial court erred in: (1) signing and entering both the 2 July and the 22 September orders insofar as they relate to the preliminary injunction against communication with Mrs. Brown's friends and associates; and (2) refusing to grant his 12(b)(6) and 41(b) motions to dismiss. He also seeks to appeal Judge Morton's 4 February order as it pertained to his obligation to pay attorney fees.

II

[1] Mr. Brown first argues that the trial court erred by ordering a hearing on, and eventually granting, Mrs. Brown's motion for a preliminary injunction preventing him from discussing his grievances with Mrs. Brown's neighbors, friends, and co-workers. Because the 2 July order scheduling the matter for hearing was interlocutory, we confine our consideration to the propriety of the 22 September decision to grant the injunction. Mrs. Brown contends that the preliminary injunction is also an interlocutory order from which Mr. Brown's appeal is premature. However, as the language of the order contemplates no further action by the trial court, we deem it to be a final order for the limited purpose of allowing this appeal.

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Mr. Brown challenges the trial court's issuance of the preliminary injunction on five separate grounds. Because we find merit in his first argument, we need not address the remaining four.

Citing *Hutchins v. Stanton*, 23 N.C. App. 467, 209 S.E. 2d 348 (1974), Mr. Brown argues that the trial court erred by granting preliminary injunctive relief because there was no primary action or claim to which the preliminary injunction could attach. In *Hutchins*, plaintiff sought a temporary restraining order and later a preliminary injunction to prevent defendant from interfering with the erection and maintenance of a replacement boundary fence on property leased to the plaintiff. Plaintiff made no other prayer for relief. The trial court granted the temporary restraining order and subsequently issued a preliminary injunction. This Court later vacated the preliminary injunction for lack of a primary claim to which it could attach.

The purpose of a preliminary injunction is to preserve the status quo pending trial on the merits. *Setzer v. Annas*, 286 N.C. 534, 537, 212 S.E. 2d 154, 156 (1975). "The assumption is that a plaintiff seeking a temporary restraining order or a preliminary injunction eventually wants permanent relief." *Hutchins*, 23 N.C. App. at 470, 209 S.E. 2d at 349. "[T]here has to be an action pending to which the temporary injunction can be ancillary." *Id.* at 470, 209 S.E. 2d at 350.

In this case, Mrs. Brown's June motion essentially stated two claims for relief: contempt of court, and rescission of the consent order and separation agreement. Her request for a preliminary injunction could attach to either. There was no prayer for a permanent injunction. However, once the trial court dismissed Mrs. Brown's motions to hold Mr. Brown in contempt and to rescind the separation agreement and consent order, her prayer for a preliminary injunction ceased to be ancillary to any pending cause of action. Mrs. Brown argues, in contradiction to her earlier position, that we should treat the temporary injunction as having the force and effect of a permanent injunction. However, the entry of a permanent injunction would have exceeded the scope of the pleadings. Moreover, the order was denominated a temporary injunction by the trial court, and we may not presume that anything more was intended.

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For these reasons, we hold that the trial court erred by issuing the preliminary injunction. Accordingly, that portion of the 22 September order awarding the preliminary injunction is vacated. We do not mean to suggest by this decision that Mr. Brown should be free to engage in harassing conduct toward Mrs. Brown. Mrs. Brown is not without remedy, but she must seek a permanent injunction in a proper way.

III

Mr. Brown's arguments concerning the denial of his various motions to dismiss also challenge the trial court's grant of injunctive relief to Mrs. Brown. In light of our resolution of the preceding issue, we need not address these contentions.

IV

Mr. Brown next contends that the trial court erred in assigning him attorney fees in the 4 February 1987 order. Rule 3 of the North Carolina Rules of Appellate Procedure states that notice of an appeal must be filed within 10 days of entry of judgment. The record does not reflect when, if ever, Mr. Brown gave notice of appeal. Moreover, on 7 May 1987, Judge Morton dismissed the appeal for failure to timely serve his proposed record on appeal. Hence, this issue is not properly before us.

V

[2] By a cross-assignment of error, Mrs. Brown contends that the trial court erred in denying her attorney fees in the 22 September order. We note that this contention constitutes an attack upon a portion of the trial judge's order and, as such, could only be properly brought before this Court by cross-appeal. See *Stevenson v. N.C. Dept. of Insurance*, 45 N.C. App. 53, 262 S.E. 2d 378 (1980). In any event, Mrs. Brown's position is predicated on a contention that Mr. Brown materially breached the separation agreement and, by its terms, is responsible as the "defaulting party" for the payment of attorney fees. However, the trial court dismissed Mrs. Brown's cause of action for rescission of the agreement based on material breach by Mr. Brown, and Mrs. Brown has not appealed that ruling. Moreover, contrary to Mrs. Brown's contentions, we can discover no specific finding of fact by the trial court that Mr. Brown violated the separation agreement. Conse-

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quently, we conclude that the denial of attorney fees to Mrs. Brown was proper.

The preliminary injunction is hereby vacated.

Judge WELLS concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

The simple problems raised by the motions involved in this appeal were inordinately confused by the parties and court inappropriately treating them as though they were complaints or other statements of a claim subject to the requirements of Rule 12, N.C. Rules of Civil Procedure, and by treating the hearings thereon as though they were non-jury trials under the provisions of Rule 41. Except for modifications that might be required by a change of circumstance affecting the welfare of the child or defendant's financial ability, this action for alimony, child custody, and possession of the marital property was resolved by the consent order; and after it was entered, no claim or cause of action was left to either evaluate or try. Defendant's "Motion to Divide Undivided Marital Property" instead of undertaking to state a claim or cause of action, as the plaintiff and the court assumed, was simply a motion for relief from a judgment or order under the provisions of Rule 60; for the order recited that the property of the parties had been finally distributed to their satisfaction and the motion asserted that through mistake the child's pictures had not been divided and that such a division should be made. Rather than decide from the pleadings and the separation agreement whether the motion stated "a claim upon which relief can be granted," the court should have determined from evidence whether a mistake about the pictures had been made. But this error and the equally erroneous finding that followed in its wake—that the motion had no good faith basis and attorney's fees should be awarded plaintiff—is beyond correction since under the circumstances the order was a final one and no appeal was taken within the time designated.

In re Kozy

IN THE MATTER OF: DR. JOHN KOZY, A MEMBER OF THE FACULTY OF THE
DEPARTMENT OF PHILOSOPHY, EAST CAROLINA UNIVERSITY

No. 883SC131

(Filed 20 September 1988)

**Schools § 13.2— dismissal of male teacher—misconduct toward female students—
substantial evidence**

In review of the whole record there was substantial evidence to support the trial court's decision that ECU acted properly in dismissing petitioner as a faculty member because of misconduct of such a nature as to indicate that he was unfit to continue as a member of the faculty where such evidence tended to show that petitioner sexually harassed female students by putting his arms around their shoulders and ribs, squeezing one's shoulder, and suggesting to one student that he would give her an A in exchange for sexual favors.

APPEAL by petitioner from *Tillery, Judge*. Order entered in open court on 5 November 1987 and filed on 20 January 1988 in Superior Court, PITT County. Heard in the Court of Appeals 8 June 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas J. Ziko, for respondent-appellee East Carolina University.

Ward and Smith, P.A., by Robert D. Rouse, Jr., for petitioner-appellant.

JOHNSON, Judge.

This is an appeal by petitioner, Dr. John Kozy, from an order affirming the final agency decision discharging him as a faculty member of East Carolina University.

By letter dated 7 October 1986, the Chancellor of East Carolina University notified petitioner of the intent of the University to discharge petitioner from employment. At the time, petitioner was a tenured faculty member of the University's Department of Philosophy. Upon request by petitioner, the Chancellor provided him with a "Specification of Reasons for Intent to Discharge," in a letter dated 24 October 1986. Based upon the tenure policies and regulations, the letter alleged that the reason for petitioner's discharge was misconduct of such a nature as to indicate that he was unfit to continue as a member of the faculty. Of the ten

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specifications, nine involved petitioner's alleged sexual harassment of female students in his classes.

Petitioner requested a hearing before a due process committee, which conducted a hearing, and made findings and conclusions as to the specifications alleged. A majority of the committee found against petitioner on six of the ten specifications, and concluded that he should not be retained as a member of the faculty. A minority conclusion was filed with the committee's report which stated that: "[d]ismissing [petitioner] at this time is not warranted and sanctions other than termination of employment should be explored seriously and invoked."

By letter dated 23 April 1987, the Chancellor notified petitioner that he was discharged. Petitioner appealed to the board of trustees of East Carolina University. The board determined, by majority vote, that a preponderance of the evidence with respect to four of the original ten specifications reasonably supported the Chancellor's action terminating petitioner's employment.

On 2 July 1987, Dr. Kozy petitioned the Board of Governors of the University of North Carolina to review the decision of the board of trustees of East Carolina University on the ground that the decision to discharge him violated several specific provisions of the code of The University of North Carolina. On 31 July 1987, the Board of Governors allowed Dr. Kozy's petition for review but limited the scope of the review to whether the petitioner had been denied due process.

On 11 September 1987, after considering the record, briefs and arguments, the committee on personnel and tenure of the Board of Governors submitted its report to the Board of Governors. The committee report concluded that petitioner failed to demonstrate that ECU had violated any of his due process rights under the Code or the Constitution. The Board of Governors approved the report which denied Dr. Kozy's petition for reversal.

On 2 October 1987, Dr. Kozy filed a petition for judicial review pursuant to G.S. sec. 150B-43. Petitioner alleged, *inter alia*, that his rights had been prejudiced because ECU's decision to discharge him from his employment was not supported by substantial evidence in the administrative record.

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On 5 November 1987, after reviewing the decisions of the various boards, the petition, the record, the briefs and arguments, the trial court determined that the petitioner's substantial rights had not been prejudiced by ECU's decision to discharge him from the faculty and affirmed the final agency decision. From entry of that order, petitioner appeals.

Petitioner brings forth two arguments for this Court's review. For the following reasons, we affirm.

First, petitioner contends that his substantial rights were prejudiced because the findings, inferences and conclusions adverse to him were not supported by substantial evidence. This Court's review, pursuant to G.S. sec. 150B-52, of the trial court's order affirming the final agency's decision, is the same in scope as it is for other civil cases. Thus, we must determine whether the trial court committed any errors of law which would be based upon its failure to properly apply the review standard articulated in G.S. sec. 150B-51. *American Nat'l Ins. Co. v. Ingram*, 63 N.C. App. 38, 303 S.E. 2d 649, cert. denied, 309 N.C. 819, 310 S.E. 2d 348 (1983).

An agency decision may be reversed or modified by the trial court if it is "[u]nsupported by substantial evidence . . . in view of the entire record as submitted." G.S. sec. 150B-51(5).

This standard of review is known as the 'whole record' test. When, in applying this test, reasonable but conflicting views emerge from the evidence, this Court cannot replace the agency's judgment with its own. It must, however, 'take into account whatever in the record fairly detracts from the weight' of the evidence which supports the decision. Ultimately it must determine whether the decision has a rational basis in the evidence.

General Motors Corp v. Kinlaw, 78 N.C. App. 521, 523, 338 S.E. 2d 114, 117 (1985) (citations omitted).

We shall consider the trial court's decision in light of this standard of review. Under the applicable provisions of the university code, a tenured professor could only be discharged from employment or diminished in rank "for reasons of incompetence, neglect of duty, or misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty."

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Petitioner was discharged for "unfitness" because he had allegedly sexually harassed three female students on separate occasions. According to ECU's sexual harassment policy, employees are prohibited from:

- (a) making unwelcomed sexual advances or requests for sexual favors or other verbal or physical conduct of a sexual nature a condition of a student's grade, progress, or recommendation or,
- (b) creating an intimidating, hostile or offensive learning environment by such conduct.

Under its policy, the university defines sexual harassment as "deliberate, unsolicited, unwelcomed verbal and/or physical conduct of a sexual nature or with sexual implications. The definition does not include personal compliments welcomed by the recipient or relationships which are freely entered into by both parties."

Based upon the foregoing rules and policies, the following specifications were found to be reasonably supported by the evidence and therefore adequate grounds for petitioner's dismissal. The four specifications which follow are those which were first enumerated in the Chancellor's letter of dismissal, and were later adopted by the board of trustees of East Carolina University as adequate grounds for dismissal.

Specifications

4. In July 1983, you harassed Daisy Morales, a female student in your class, by repeatedly putting your arms around her shoulder during class and during examination and by leaning against her and touching parts of her arms or shoulders and by asking her if she needed mouth-to-mouth resuscitation, when she coughed during a lecture.
5. In March 1984, you harassed Melissa Reed, a female student in your class, by going to her seat and squeezing her shoulder.
8. During the 1986 summer session, in your PHIL 1500 course, you harassed Constance Jones, a female student enrolled in the class, while she was taking a make-up test, by putting your arms around her shoulder and ribs which prompted her to insist that you leave her alone.

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9. Later in the 1986 summer session, you harassed Constance Jones by suggesting that she could remedy her poor performance in PHIL 1500 and attain an A if she worked alone with you and was 'cooperative.' Those comments were intended to mean and were interpreted to mean that she would receive an A in exchange for sexual favors.

Petitioner contends that the specifications do not provide a rational basis for the conclusions reached by the due process committee and board of trustees. Applying the "whole record test," we believe that each specification was supported by substantial evidence which provided a rational basis for the conclusion reached by all the reviewing agencies and the trial court.

As for Specification 4, the evidence reveals that during an examination, Claudia Williams observed petitioner fondling a necklace Daisy Morales was wearing around her neck which was hanging between her breasts. Petitioner admitted that he examined the necklace, but testified that he did not believe his actions were intimidating or offensive. Ms. Morales wrote petitioner a letter to complain about his conduct on this occasion. She also complained in the letter about petitioner repeatedly putting his arms around her and leaning against her while examining her classwork. Petitioner testified that he had a habit of frequently placing his arms around students but did not feel that his behavior was offensive or intimidating.

The committee relied upon this evidence to find that petitioner's behavior "did create an offensive and intimidating classroom environment for Ms. Morales."

The board of trustees concurred with this finding and concluded that it reasonably supported the Chancellor's conclusion that petitioner was unfit to teach. Although there may have been conflicting views, the credibility of the witnesses and the resolution of conflicts in their testimony is a matter for the agency, not a reviewing court. *In re Dailey v. North Carolina State Bd. of Dental Examiners*, 60 N.C. App. 441, 299 S.E. 2d 473, *rev'd on other grounds*, 309 N.C. 710, 309 S.E. 2d 219 (1983). Consequently, the findings of fact found by the respective committee and board were supported by substantial evidence and amply supported the conclusions of law and the ultimate decision reached by the trial court.

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In regard to Specification 5, the evidence revealed that on two separate occasions petitioner squeezed the shoulder of Melissa Reed during class. Ms. Reed was taking an examination during one of those occasions. Ms. Reed, by letter, informed the director of the equal opportunity programs, that petitioner's behavior was offensive and objectionable to her. Petitioner was given a copy of the complaint. Petitioner testified that he had squeezed her shoulders but he "had perfectly reasonable explanations for those events and did not take the matter seriously."

The committee found that Ms. Reed did find this contact objectionable and offensive, but was not certain that the conduct fell within the scope of ECU's sexual harassment policy. The board of trustees concurred in the committee's finding but held that the conduct reasonably supported the Chancellor's conclusion that petitioner had engaged in misconduct on these occasions. Although there were conflicting views as to whether this conduct was sexual in nature, the credibility of the witnesses is a matter for the agency and not the reviewing court. *Dailey, supra.* As a result, the findings of fact were supported by substantial evidence, which in turn amply support the conclusions of law.

In review of Specification 8, Constance Jones testified that she was alone in a supply room working on a make-up exam given by petitioner, when petitioner entered the room. As she continued to work, petitioner came closer and closer to her until he was directly behind her. Petitioner then leaned over her and placed one hand on her shoulder and the other hand on her rib cage. She testified that this contact made her uncomfortable and required her to ask petitioner to leave.

The incident described in Specification 9 occurred after Ms. Jones had completed the final exam. Petitioner testified that he had agreed to give her a grade of "I" (incomplete), but asked her to take the final exam on the chance that she might pass. Ms. Jones testified that after she had completed the exam, she inquired whether the offer to give her an incomplete was still available. Petitioner indicated that it was. She then asked whether any tutors would be available for the fall session and, if so, whether she could arrange to employ one. Petitioner responded that he was almost sure there would be no tutors available for the fall. She testified that she considered this statement to be in

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contradiction to his earlier assertions. She also testified that petitioner then stated, "well, if we work very closely together and you are very cooperative you won't have any problem making an A." Ms. Jones testified that she felt this statement was an offer to give her an "A" in exchange for sexual favors, based upon petitioner's tone of voice and the way he looked at her when he made the statement.

The committee determined that this conduct by petitioner created an intimidating and offensive learning environment for Ms. Jones. The board concurred in this finding and held that petitioner's conduct on these occasions reasonably supported the Chancellor's conclusion.

We believe the record contains ample evidence to support these findings and conclusions. We note that in 1985, petitioner was warned to refrain from any type of touching or contact with his students, and petitioner testified that he agreed to refrain from such contact. The contact alleged in Specifications 8 and 9 occurred in 1986. Although Ms. Jones did not immediately file a complaint when these matters occurred, she did eventually file after conversing with faculty members.

Finally, petitioner alleges that the trial court erroneously affirmed the decision of ECU to discharge him. We disagree. This Court has found no errors of law in the trial court's order affirming the agency's decision. We find that the "whole record test" was properly applied.

Accordingly, for the aforementioned reasons, the judgment of the trial court is

Affirmed.

Judges PARKER and COZORT concur.

Darnell v. Rupplin

ANN L. DARNELL v. VIVIAN RUPPLIN

No. 8721SC1048

(Filed 20 September 1988)

Husband and Wife § 24— alienation of affections—where tort occurred—question of fact for jury

In an action for alienation of affections where defendant contended that her actions supporting plaintiff's claim occurred primarily in states other than North Carolina, and none of those states recognized a claim for alienation of affections, the question of where the tort occurred giving rise to defendant's liability was an issue of fact material to both the substantive law applicable to plaintiff's cause of action and defendant's defense and therefore should have been submitted to the jury.

APPEAL by defendant from *Collier, Judge*. Judgment and order entered 10 June 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 April 1988.

Plaintiff Ann L. Darnell filed a civil action against defendant Vivian Rupplin for criminal conversation and alienation of affections. The trial court granted summary judgment for plaintiff on her criminal conversation claim. A jury subsequently found defendant guilty of alienation of affections and awarded plaintiff \$50,000 for the two claims in compensatory damages and \$50,000 in punitive damages.

Thereafter defendant filed motions requesting a judgment notwithstanding the verdict or a new trial on the claim for alienation of affections and on the issue of damages. The trial court denied defendant's motions.

From the trial court's judgment and order, defendant appeals.

Womble Carlyle Sandridge & Rice, by Carole S. Gailor, E. Spencer Parris and Wallace R. Young, Jr., attorneys for plaintiff-appellee.

William M. Speaks, Jr., Richard D. Ramsey and David F. Tamer, attorneys for defendant-appellant.

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ORR, Judge.

I.

On appeal, defendant contends an issue of fact exists as to which state the tort of alienation of affections took place. Defendant further argues the trial court committed prejudicial error by refusing to submit this issue of fact to the jury for determination. We agree.

A claim for "alienation of affections is comprised of wrongful acts which deprive a married person of the affections of his or her spouse—love, society, companionship and comfort of the other spouse. . . . The gist of the tort is an interference with one spouse's mental attitude toward the other, and the conjugal kindness of the marital relation. . . . [Evidence of alienation] is sufficient if there is no more than a partial loss of [a spouse's] affections." 2 R. Lee, *N.C. Family Law* § 207 at 553-554 (4th ed. 1980); *accord*, *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E. 2d 104 (1969).

In order for liability to arise for alienation of affections there must be active and affirmative conduct. Inaction is not enough to subject a defendant to the liability. There must be some act on the part of the defendant intended to induce or accomplish the result. One does not become liable for alienation of affections, without any initiative or encouragement, merely by becoming the object of the affections that are transferred from a spouse. It is only when there is such active participation, initiative or encouragement on the part of the defendant that he or she has in fact played a substantial part in inducing or causing one spouse's loss of the other spouse's affections, that liability arises.

2 R. Lee, *N.C. Family Law* § 207 at 554-555 (4th ed. 1980), quoting, Restatement (Second) of Torts § 683, comment (g) (1977).

To establish a claim for alienation of affections, plaintiff's evidence must prove: "(1) plaintiff and [her husband] were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the wrongful and malicious acts of defendant produced the alienation of affections." *Chappell v. Redding*, 67 N.C. App. 397, 399, 313

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S.E. 2d 239, 241, *disc. rev. denied*, 311 N.C. 399, 319 S.E. 2d 268 (1984); *Litchfield v. Cox*, 266 N.C. 622, 146 S.E. 2d 641 (1966).

However, to prevail under the present facts, plaintiff must do more than establish the essential elements named above.

A claim for alienation of affections is a transitory tort because it is based on transactions that can take place anywhere and that harm the marital relationship. 42 C.J.S. *Husband and Wife* § 683 (1975); *Howle v. Express, Inc.*, 237 N.C. 667, 75 S.E. 2d 732 (1953); *Sebastian v. Klutzz*, 6 N.C. App. 201, 170 S.E. 2d 104. The substantive law applicable to a transitory tort is the law of the state where the tortious injury occurred, and not the substantive law of the forum state. 42 C.J.S. *Husband and Wife* § 683 (1975); *Howle v. Express, Inc.*, 237 N.C. 667, 75 S.E. 2d 732; *Ingle v. Cassady*, 208 N.C. 497, 181 S.E. 562 (1935).

In the case *sub judice*, defendant's involvement with plaintiff's husband, Daniel R. Darnell, spanned four states: North Carolina, Maryland, Virginia, and Washington, D.C. Of these four states, North Carolina is the only one that recognizes a legal cause of action for the tort of alienation of affections. Therefore, if the law of any of the other three states is found to be the substantive law governing this case, it cannot be tried in a North Carolina court. *Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911 (1943); 3 Strong's N.C. Index 3d *Courts* § 21.5 (1976 & Supp. 1988).

Consequently, before North Carolina substantive law can be applied to plaintiff's action, she must prove that the tortious injury, defendant's alienation of her husband's affection, occurred in North Carolina.

II.

At trial the following evidence was produced relating to the state in which the cause of action arose.

Plaintiff's husband, Daniel R. Darnell, and defendant met in January 1984, when they were assigned to work together in the Greensboro office of G.E. Information Services Company.

Subsequently, a relationship developed between Mr. Darnell and defendant, which culminated in sexual intercourse in Winston-Salem, North Carolina on 4 April 1984. Two more sexual encounters occurred between Mr. Darnell and defendant in North

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Carolina between 5 April and 13 April 1984. In April 1984, Mr. Darnell's work in Greensboro ended, and he returned to his wife and children at their home in Virginia.

Defendant and Mr. Darnell, however, maintained contact by telephone and mail. They also arranged to meet in Virginia on 31 May 1984, 1 June 1984, and August 1984; in Washington, D.C. in either July or August 1984; and in Maryland in July 1984, October 1984, November 1984, and December 1984, where according to the testimony they engaged in sexual relations.

On 27 December 1984, Mr. Darnell left plaintiff and his family and went to defendant's home in Winston-Salem, North Carolina. He stayed with defendant until 1 January 1985. Mr. Darnell then rented an apartment in Gaithersburg, Maryland and relocated there.

Mr. Darnell and defendant continued to see each other after his separation from plaintiff. He visited defendant at least three times in North Carolina, and she met with him numerous times in Maryland. They also engaged in sexual relations from 27 December 1984 until July 1985, when Mr. Darnell told defendant he wished to reconcile with plaintiff.

In August 1985, Mr. Darnell returned to plaintiff, but a short time later in September 1985 he left her for the second time.

Mr. Darnell and defendant resumed their relationship by meeting on 25 September 1985 in Maryland. They communicated by telephone and mail from 25 September 1985 until November 1985, when they renewed their sexual relationship during a visit by Mr. Darnell to defendant's home in North Carolina.

From November 1985 until July 1986, Mr. Darnell and defendant traveled frequently between North Carolina and Maryland to be together. Finally in July 1986, defendant moved to Gaithersburg, Maryland, where Mr. Darnell resided. A month before the trial, April 1987, plaintiff and Mr. Darnell's divorce became final. At the time of the trial, defendant and Mr. Darnell were still involved in a relationship.

Based upon the evidence set forth above, defendant contends that a question of fact is present as to the state in which defendant alienated Mr. Darnell's affections. We agree with defendant's contention.

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III.

To determine whether this question should have been presented to a jury for determination, we must examine N.C.G.S. § 1A-1, Rule 38.

Rule 38 governs the issues a jury may decide. Subsection (b) of Rule 38 permits a party in a suit to demand a jury trial for any issue triable of right by a jury. N.C.G.S. § 1A-1, Rule 38(b) (1983). Subsection (c) of this rule further says, when a party demanding a jury trial fails to specify which issues the jury will decide, he is deemed to have demanded a jury trial for all triable issues. N.C.G.S. § 1A-1, Rule 38(c) (1983).

An issue that arises under the pleadings and is determinative of the parties' rights in an action is triable of right by a jury. *Uniform Service v. Bynum International, Inc.*, 304 N.C. 174, 282 S.E. 2d 426 (1981); *Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131 (1968). "An issue arises upon the pleadings when a material fact is alleged by one party and controverted by the other." *Id.* at 706, 161 S.E. 2d at 136; *Oxendine v. Dept. of Social Services*, 303 N.C. 699, 281 S.E. 2d 370 (1981). A fact is material, when it "constitutes a part of the plaintiff's cause of action or of the defendant's defense." *Johnson v. Lamb*, 273 N.C. at 707, 161 S.E. 2d at 137.

In the present case, defendant's answer contended that her actions, supporting plaintiff's claim, occurred primarily in a state other than North Carolina. Consequently, the question of where the tort occurred giving rise to defendant's liability is an issue of fact material to both the substantive law applicable to plaintiff's cause of action and defendant's defense.

In addition, defendant's answer demanded a trial by jury on all issues of fact. Thus, pursuant to N.C.G.S. § 1A-1, Rule 38, defendant is entitled to have all material issues of fact, including the *lex loci* of the tort, decided by a jury.

When discussing this tort, we are aware that numerous jurisdictions have eliminated a cause of action for alienation of affections. Our own Court attempted to abolish the tort in *Cannon v. Miller*, 71 N.C. App. 460, 322 S.E. 2d 780 (1984), but our Supreme Court rejected this Court's decision *per curiam*. *Cannon v. Miller*, 313 N.C. 324, 327 S.E. 2d 888 (1985).

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We recognize that the injury attributable to the alienation of another's affections is a nebulous concept, which, unlike a broken bone, is not a readily identifiable event. The establishment of this tortious injury is further complicated because it may be sustained through one act or through successive acts of a defendant.

However, even with this knowledge, as long as this cause of action exists in North Carolina, we conclude that the issue of where the tort took place may not be kept from a jury simply because it is difficult to discern. Therefore, we hold it is for the jury, considering all the evidence, to determine in which state plaintiff's injury occurred. Accordingly, we vacate the verdict and judgment entered on plaintiff's claim for alienation of affections, and we remand this issue for a new trial.

IV.

We also remand the issue of damages on the claim of criminal conversation for a new trial. Although the damages for the claims of criminal conversation and alienation of affections were properly joined for consideration by the jury at trial, *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E. 2d 104, on appeal it is impossible to determine what portion of the damage award is attributable solely to the alienation of affections claim.

Finally, we conclude that defendant's remaining assignments of error are unlikely to arise in a second trial, and we decline to discuss them.

Vacated and remanded.

Judges ARNOLD and GREENE concur.

Smith v. Buckhram

WILFRENIA WILLIAMS SMITH v. DARREN DEVON BUCKHRAM AND SECURITY STORAGE COMPANY, INC. D/B/A SECURITY MAYFLOWER AGENCY

No. 888SC84

(Filed 20 September 1988)

1. Evidence § 50—chiropractor's testimony—injury to ligaments and muscles—testimony admissible—no objection properly made

In an action to determine the amount of damages plaintiff was entitled to recover for injuries sustained in an automobile accident, the trial court did not err in admitting into evidence the opinion testimony of a chiropractor concerning damage or injury to plaintiff's ligaments and muscles, since defendants failed to object when the issue was first raised; the question to which they finally entered an objection was based upon ligament and not muscle injury; and the testimony regarding ligaments of the spine was within the scope of chiropractic as defined in N.C.G.S. § 90-143 and was therefore a proper subject of testimony by the witness.

2. Appeal and Error § 30.2; Rules of Civil Procedure § 15—permanency of injuries—only general objections made to evidence—issue treated as if raised in pleadings

In an action to determine the amount of damages plaintiff was entitled to recover for injuries sustained in an automobile accident, the trial court did not err by allowing testimony that plaintiff's injury was permanent, and by instructing the jury on the issue of permanency, on the ground that plaintiff failed to include an allegation to that effect in her complaint, since defendants' objections to this line of testimony were all general in nature; defendants did not avail themselves of the opportunity to demonstrate prejudice or to obtain a continuance; and the issue of permanency of injuries was properly treated by the court as if it had been raised in the pleadings. N.C.G.S. § 1A-1, Rule 15(b).

3. Automobiles § 91.5—injuries in accident—amount of damages—aggravation of preexisting condition—instruction improper

In an action to determine the amount of damages plaintiff was entitled to recover for injuries sustained in an automobile accident, the trial court erred in instructing the jury on the aggravation of plaintiff's preexisting condition where there was no evidence showing aggravation of a preexisting condition.

APPEAL by defendants from *Llewellyn, James D., Judge*. Judgment entered 30 July 1987 in Superior Court, WAYNE County. Heard in the Court of Appeals 2 June 1988.

R. Michael Bruce for plaintiff-appellee.

Dees, Smith, Powell, Jarrett, Dees & Jones, by William W. Smith, for defendant-appellants.

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JOHNSON, Judge.

Plaintiff commenced this civil action on 17 November 1986, seeking damages for personal injuries she sustained on 3 September 1985 when defendant corporation's truck struck her car in the rear. In their answer defendants denied negligence, but when the matter was called for trial, the parties stipulated that defendant driver, who was operating the vehicle in the course of his employment, had injured the plaintiff through his negligence. The case was tried solely on the issue of damages.

Plaintiff presented evidence which showed that she received injuries to her back, neck, and chest and was treated at Wayne Memorial Hospital. She initially received physical therapy from her family physician, but sought treatment from Dr. Anthony Hamm, a doctor of chiropractic, after her condition failed to improve.

The plaintiff's evidence further revealed that on 22 and 27 October 1985, in written opinions rendered by both Dr. Anthony Hamm and Dr. Lucas Scott respectively, plaintiff was given a prognosis for recovery without permanent disability or impairment.

Plaintiff also presented evidence in the form of testimony by Dr. Hamm that on 24 July 1987, three days before the case was calendared for trial, he examined her at the request of plaintiff's counsel. He determined at that time that plaintiff had some sensory loss of the nerves between the second and third thoracic vertebrae on the left side of her body. He also determined that she was suffering from a permanent disability of her cervical or upper thoracic spine. Dr. Hamm testified further that based upon the American Medical Association's rating guide, plaintiff was suffering five percent permanent physical impairment.

Defendants presented no evidence at trial. Based upon the evidence submitted, the jury returned a verdict of \$35,000.00. Defendants then made post-trial motions to set aside the verdict, and for a new trial. The trial court denied both motions, and entered its judgment based upon the jury's verdict. From this judgment, defendants appeal.

[1] On appeal defendants have submitted three questions for this Court's review. By their first Assignment of Error, defend-

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ants contend that the trial court committed reversible error by admitting into evidence the opinion testimony of Dr. Hamm, concerning damage or injury to plaintiff's ligaments and muscles, because such an opinion was beyond the field of chiropractic as defined in G.S. sec. 90-143. We cannot agree.

G.S. sec. 90-157.2 states in pertinent part that:

A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological and pathological considerations *within the scope of chiropractic.*

(Emphasis supplied.)

G.S. sec. 90-143 defines chiropractic as:

[T]he science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body.

Defendants rely upon *Ellis v. Rouse*, 86 N.C. App. 367, 357 S.E. 2d 699 (1987), to support their argument that "[t]he testimony as to the opinion of the strain or sprain of muscle *and ligaments* should have been excluded because such injury and treatment is beyond the field of chiropractic as defined by statute." We find this reliance misplaced, as *Ellis* states that testimony regarding the strain or sprain of a muscle is beyond the field of chiropractic as statutorily defined. *Ellis* did not include any discussion regarding ligaments. On this issue, we find Dr. Hamm's testimony helpful.

Q. Would you explain to the jury what happens to ligaments when they are stretched, when they're injured as much as Mrs. Smith's were.

A. I would like to preface that to say that a ligament injury was not the main issue in her particular case but more of a muscular type injury although there was some evidence of some minor ligament damage. [No objection entered.]

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When a ligament—it is not like a muscle. *A ligament in the spine is what sustains the spine. It keeps everything in the normal alignment where it should be.* When a person's neck is injured in a flexion-extension type injury there are ligaments that run along the front of the spine and there's also ligaments that run down the back and whenever there's forward or backward trauma to that spine, especially in the neck you can get some stretching of the ligaments.

When a ligament is injured, two things are noteworthy:

One, a ligament has more pain fibers than a muscle does and it becomes more painful and secondly it has less blood supply so it doesn't heal as quickly as a muscle injury.

Q. Do you have an opinion based on your examination of Mrs. Smith and your treatment of her during the period that you have described as to whether she had any damage or injury to her ligaments?

Objection.

Court: Overruled.

EXCEPTION NO. 14.

A. Minor injury to the ligaments; mostly to the muscles and nerves, sir.

This testimony reveals that: (1) defendants lost the benefit of their objection to testimony concerning the injury to muscles, as they failed to object when the issue was first raised; *see State v. Whitley*, 311 N.C. 656, 319 S.E. 2d 584 (1984); 1 Brandis on North Carolina Evidence, sec. 30 (1982); (2) the question to which they finally entered an objection was based upon ligament and not muscle injury; and (3) the trial court properly overruled the objection, as testimony regarding ligaments of the spine is within the scope of chiropractic as defined in G.S. sec. 90-143. (See also Dorland's Illustrated Medical Dictionary 732-43, 845-55 (26th ed. 1981), for the definitions of and differentiation between ligaments and muscles.) Therefore, we overrule defendant's first assignment of error.

[2] Defendants next contend that the trial court erred by allowing testimony that plaintiff's injury was permanent, and by in-

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structing the jury on the issue of permanency, because plaintiff failed to include an allegation to that effect in her complaint. Again we find no error.

G.S. sec. 1A-1, Rule 15(b) provides that:

When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.*

(Emphasis added.)

Although defendants are correct in their assertion that plaintiff did not amend her complaint to allege that her injuries were permanent, testimony was raised at trial to that effect. The objections made at trial to this line of testimony were all general in nature, therefore defendants did not avail themselves of the opportunity to demonstrate prejudice, or to obtain a continuance, as provided for in the statute. Therefore the issue of permanency of injuries was properly treated by the court as if it had been raised in the pleadings.

Insofar as the assignment of error concerns the jury instruction, we believe that since the evidence of permanency was properly introduced at trial and comprised a substantial feature of the case, the court was required to instruct the jury on the issue. G.S. sec. 1A-1, Rule 51(a); *In re Will of Cooley*, 66 N.C. App. 411, 311 S.E. 2d 613 (1984).

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Defendants also rely upon *Thacker v. Ward*, 263 N.C. 594, 140 S.E. 2d 23 (1965), to support their contention that injuries to nerves are special damages which should be specifically pleaded.

Suffice it to say that we find *Thacker* totally inapposite to the facts in the case *sub judice*, as it involved the plaintiff's obligation to specially allege traumatic neurosis, a psychological illness, in order to recover for its effects. We have no psychological injury before us for consideration.

[3] Lastly, defendants contend that the trial court erred by instructing the jury on the aggravation of plaintiff's pre-existing condition, because the complaint did not contain an allegation of that import, and because the evidence showed no aggravation of a pre-existing condition.

We decide this issue on part two of this assignment of error, because we agree that the evidence showed no aggravation of a pre-existing condition and the court therefore improperly instructed the jury.

Dr. Hamm, plaintiff's chiropractor, testified as follows:

Q. Do you have an opinion based on your examination of her during 1985 and also last week as to whether or not the accident in which she was involved on September 3, 1985 may have aggravated a dormant or incipient condition which she had as a result of the 1981 and 1982 accidents?

Objection.

Court: Overruled.

EXCEPTION NO. 17.

A. *Not that I know of.*

Mr. Bruce: I didn't understand the ruling of the court.

Court: Overruled and he said not that he knew of.

Q. *Do you have an opinion based on your examination of Mrs. Smith last week and during the fall of 1985 as to whether the accident in which she was involved on September 3, 1985 may have aggravated the condition from which she was suffering after her 1981 and 1982 accidents?*

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Objection.

Court: Overruled.

EXCEPTION NO. 18.

A. *Not that I know of.*

Q. Sorry?

A. *Not that I know of as far as aggravating that injury.*

Move to strike.

Court: Denied.

EXCEPTION NO. 19.

On the issue of the aggravation of a pre-existing condition, the court instructed the jury as follows:

[In this case, the Defendant contends, and the Plaintiff denies, that the aggravation of Plaintiff's spinal condition was not reasonably foreseeable and, that, therefore, the Defendant's conduct could not be a proximate cause of Plaintiff's injury.

When a Defendant's negligent conduct would not have resulted in any injury to a Plaintiff of ordinary susceptibility, the Defendant would not be liable for the harmful consequences which result from that Plaintiff's peculiar susceptibilities, such as the aggravation of a pre-existing condition, unless, under the circumstances, the defendant knew or should have known of such peculiar condition. However, if the negligent conduct of the Defendant would have resulted in any injury to a person of ordinary susceptibility, then the negligent conduct of the Defendant would be a proximate cause of the Plaintiff's injury, and the Defendant would be liable for all the harmful consequences which occur—even though these harmful consequences may be unusually extensive because of the aggravation of a pre-existing condition.]

EXCEPTION NO. 26.

Therefore, we find that the trial court improperly performed its duty to instruct the jury on all substantial matters arising from the evidence when it supports a *reasonable inference* of the

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claim or defense when viewed in the light most favorable to the proponent. G.S. sec. 1A-1, Rule 51; *Cooley, supra*; *Plymouth Pallet Co., Inc. v. Wood*, 51 N.C. App. 702, 277 S.E. 2d 462, *disc. rev. denied*, 303 N.C. 545, 281 S.E. 2d 393 (1981). Even when viewed in the light most favorable to the proponent, the evidence simply does not support any inference of the aggravation of a pre-existing injury.

It is for the foregoing reasons that we grant defendants a new trial.

New trial.

Judges PARKER and COZORT concur.

JAMES E. EVANS AND WIFE, MRS. EVANS v. R. A. APPERT AND WILSON MEMORIAL HOSPITAL, INC.

No. 887SC14

(Filed 20 September 1988)

1. Physicians, Surgeons, and Allied Professions § 17— malpractice—applicable standard of care—summary judgment proper

The trial court properly entered summary judgment for defendant in a medical malpractice action where defendant showed that plaintiffs failed to produce sufficient evidence of the applicable standard of care, of a breach of that standard of care, and that the damages suffered by them were proximately caused by defendant.

2. Physicians, Surgeons, and Allied Professions § 17— malpractice—applicable standard of care not shown—summary judgment proper

Testimony by one of plaintiff's expert witnesses in a medical malpractice case that he was familiar with the standard of care for the diagnosis and treatment of plaintiff's condition by orthopedic surgeons, and testimony by another expert witness which made no reference at all to the standard of care for orthopedic doctors in Wilson, N. C., was insufficient to show what the standard of care was, and the trial court therefore properly granted defendant's motion for summary judgment.

3. Rules of Civil Procedure § 56.2— summary judgment granted before discovery complete—no error

The trial court did not abuse its discretion in granting defendant's motion for summary judgment before discovery was complete where the action had been pending for one year; although the deposition of an expert witness had

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been concluded, it had not yet been completed by the court reporter; and the information contained in the testimony could have been made available to the court for its review in some form.

Judge PHILLIPS concurs in the result.

APPEAL by plaintiffs from *Preston, Judge*. Judgment entered 24 August 1987 in Superior Court, WILSON County. Heard in the Court of Appeals 11 May 1988.

R. Marie Sides, Chris Kremer and James T. Bryan, III, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by John D. Madden and C. Ernest Simons, Jr., for defendant-appellee, R. A. Appert.

JOHNSON, Judge.

This is a medical malpractice action instituted by plaintiffs, Mr. and Mrs. James E. Evans, against defendants R. A. Appert and Wilson Memorial Hospital, Inc.

On 22 August 1983, plaintiff, James Evans, was admitted to Wilson Memorial Hospital for reduction of his fused right hip and the installation of an artificial joint. Dr. Appert performed surgery on plaintiff on 23 August 1983. During surgery, Dr. Appert encountered an abnormal amount of bleeding and, as a result, he decided to stop the surgery and to resume it at a later date.

On 29 August 1983, Dr. Appert operated on Evans for completion of his hip replacement surgery. He replaced Evans' right hip and nerve with a hip prosthesis allegedly oriented in the wrong direction. Over the next several months, Evans complained of pain in his right hip. Eventually, Evans went to North Carolina Memorial Hospital in Chapel Hill to seek additional treatment, and in May 1984, Dr. Paul Lachiewicz reoperated on Evans' right hip.

On 19 June 1986, plaintiffs filed their complaint against defendants. On 23 July 1986, defendant Appert served upon plaintiffs his first set of interrogatories, which requested, *inter alia*, the identity of plaintiffs' expert witnesses. On 26 August 1986, plaintiffs served their responses to these interrogatories indicating that their expert witnesses had not yet been determined.

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On 12 June 1987, plaintiffs served upon defendant Appert their first request for admissions and a second set of interrogatories. Defendant Appert's verified responses to the same were served on 14 July 1987.

On 16 July 1987, plaintiffs supplemented their response to Dr. Appert's first set of interrogatories and identified Dr. Hyatt, Dr. Glascock and Dr. Laskin as expert witnesses. On 6 August 1987, Dr. Appert filed a motion for further discovery, to allow his counsel to take the depositions of Drs. Hyatt and Laskin. On 14 August 1987, the trial court granted this motion. On 12 August 1987, Dr. Appert filed a motion for summary judgment along with his own supporting affidavit.

On 14 August 1987, plaintiffs further supplemented their responses to Dr. Appert's first set of interrogatories by expanding the scope of Dr. Glascock's role as an expert witness. On 21 August 1987, Dr. Appert filed a motion to exclude the testimony of Drs. Hyatt and Laskin at the trial scheduled to begin on 24 August 1987, on the basis that these individuals had not been made available for their discovery deposition as required by the trial court's order of 14 August 1987. On the same day, Dr. Appert filed a motion to exclude Dr. Glascock's testimony. On 21 August 1987, plaintiffs served a copy of Dr. Glascock's affidavit upon Dr. Appert in opposition to his motion for summary judgment.

On 24 August 1987, the trial court heard Dr. Appert's motion for summary judgment and to exclude the testimonies of Drs. Glascock, Hyatt and Laskin. The trial court granted Dr. Appert's motion to exclude to the extent that it gave plaintiffs thirty days to make Drs. Hyatt and Laskin available for their depositions, if this case was not going to be tried during the 24 August term of court. The court also ruled that if plaintiffs failed to make Drs. Hyatt and Laskin available for the taking of their depositions, within the allotted thirty days, their testimonies would be excluded from any eventual trial in the matter.

The second half of Dr. Lachiewicz's deposition was not yet on file, and plaintiffs' counsel moved for a continuance to enable the trial court to review it after it was typed by the court reporter. The trial court denied plaintiffs' motion to which they excepted. The trial court then granted Dr. Appert's motion for summary

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judgment after having considered the various affidavits, including that of Dr. Harold Glascock, depositions of record, case authorities, memoranda, and arguments of counsel. The court further ruled that plaintiffs' action against defendant Wilson Memorial Hospital, Inc. be stayed pending the outcome of this appeal. Plaintiffs' appeal is from entry of summary judgment in favor of defendant Appert.

Plaintiffs bring forth three Assignments of Error for this Court's review. For the following reasons, we affirm the judgment of the trial court.

[1] By their first Assignment of Error, plaintiffs contend that the trial court erred in granting summary judgment for Dr. Appert since there were patent doubts as to the credibility of his sole supporting affidavit, and Dr. Appert failed to carry his burden of demonstrating the absence of genuine issues of material fact. We cannot agree.

In a medical malpractice action, the plaintiff must prove that the defendant breached the applicable standard of care, and that the defendant's treatment proximately caused the injury. *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E. 2d 287, 291 (1978). Summary judgment is rarely appropriate in negligence cases. *Beaver v. Hancock*, 72 N.C. App. 306, 324 S.E. 2d 294 (1985). In support of his motion for summary judgment, defendant Appert had the initial burden of showing that an essential element of plaintiffs' case did not exist as a matter of law or showing, through discovery, that plaintiffs could not produce evidence to support an essential element of their claim. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Plaintiffs were then required to produce a forecast of evidence showing the existence of a genuine issue of material fact with respect to the issues raised by the movant. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E. 2d 355 (1985).

Defendant Appert supported his motion by submitting his own affidavit. Plaintiffs contend that defendant Appert's affidavit is insufficient to support his motion because his testimony is "circumstantially suspicious" and his credibility is "inherently suspect." Plaintiffs contend that the affidavit is "suspicious" because defendant Appert fails to deny negligence regarding the ab-

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normal amount of bleeding which was encountered during the 23 August 1983 surgery.

After carefully reviewing defendant Appert's affidavit, we do not find that it is inherently suspect. Dr. Appert met his burden of proof on his motion for summary judgment by showing that plaintiffs had failed to produce sufficient evidence of the applicable standard of care, of a breach of that standard of care, and that the damages suffered by them were proximately caused by defendant Appert. Thus, plaintiffs' assignment of error is overruled.

[2] By their second Assignment of Error, plaintiffs contend that the trial court erred in granting summary judgment for defendant Appert because there were genuine issues of material fact as to the elements of their claim for medical malpractice against him. Plaintiffs contend that this evidence of a material fact is raised in the affidavit of Dr. Harold Glascock and the deposition of Dr. Paul Lachiewicz. Again, we do not agree.

Because defendant Appert has shifted the burden to plaintiffs to establish a genuine issue of material fact, plaintiffs must offer sufficient evidence to establish the standard of care to which the defendant physician was held, a breach of that standard, proximate cause and damages. *Beaver, supra.*

In *Rorrer, supra*, our Supreme Court dealt with a legal malpractice action in which the plaintiff relied upon his expert witness' affidavit to resist defendant's motion for summary judgment. In *Rorrer*, plaintiff's expert witness testified, in his affidavit, that he was familiar with the standard of care applicable to the defendant, that the defendant did not comply with the existing standard of care, and that "the (alleged) departure from standards of care 'contributed greatly'" to the plaintiff's alleged damages. *Id.* at 362, 329 S.E. 2d at 370. The Court held that the attorney's affidavit was insufficient to forecast proof that defendant's preparation for, and conduct of, the medical malpractice trial was such that defendant breached his duty of reasonable care and diligence to plaintiff because it failed to establish what the standard of care to which defendant was subject required him to do. *Id.* at 356, 329 S.E. 2d at 366 (emphasis added).

Similarly, in the case *sub judice*, Dr. Glascock stated in his affidavit that he was "familiar with the standards of care for the

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diagnosis and treatment of the plaintiff's mental and physical condition by board certified orthopedic surgeons such as Dr. Appert . . ." However, there is nothing in Dr. Glascock's affidavit which identifies what the applicable standard of practice is for orthopedic surgeons, or identifies what Dr. Appert was required to do in his care and treatment of plaintiff.

The deposition of Dr. Lachiewicz reveals that the type of operation performed by Dr. Appert is difficult and controversial and that there is a divergence of views on the proper procedure. In addition, in Dr. Lachiewicz's opinion, Dr. Appert was not negligent in performing the hip replacement surgery on Evans. Furthermore, there is not an iota of testimony by Dr. Lachiewicz as to what the standard of care is for orthopedic doctors in the city of Wilson, North Carolina. Thus, we believe that plaintiffs' inability to produce evidence of the applicable standard of care required the court to grant defendant's motion for summary judgment as it did.

Plaintiffs also contend that the doctrine of *res ipsa loquitur* applies to this case and that therefore defendant was not entitled to judgment as a matter of law. We conclude that the doctrine of *res ipsa loquitur* does not apply to the facts of the case *sub judice* and therefore overrule this argument.

[3] Finally, in plaintiffs' third Assignment of Error, they contend that the trial court abused its discretion by granting summary judgment before discovery was complete. We do not agree.

On the day of the hearing at which summary judgment was granted, the second half of Dr. Lachiewicz's deposition had not yet been reduced to writing and added to the court's file. Plaintiffs informed the trial court of this fact and unsuccessfully moved for a continuance pursuant to G.S. sec. 1A-1, Rule 56(f), so that the trial court could consider the entire deposition before ruling on defendant's motion for summary judgment.

"Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E. 2d 216, 220 (1979). However, the trial court is not barred in

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every case from granting summary judgment before discovery is completed. *Joyner v. Hospital*, 38 N.C. App. 720, 248 S.E. 2d 881 (1978). The decision to grant or deny a continuance is solely within the discretion of the trial court, and its decision will not be reversed absent a manifest abuse of that discretion. *Manhattan Life Insurance Co. v. Miller Machine Co.*, 60 N.C. App. 155, 298 S.E. 2d 190 (1982), *disc. rev. denied*, 307 N.C. 697, 301 S.E. 2d 389 (1983).

At the time when summary judgment was granted, the action had been pending for over one year. Although the deposition of Dr. Lachiewicz had been concluded, it had not yet been completed by the court reporter. Thus, information contained in the testimony could have been made available to the court for its review in some form. In light of this fact, we find no abuse of discretion by the trial court in granting defendant's motion for summary judgment before discovery was complete.

Accordingly, for all the aforementioned reasons, the judgment of the trial court is

Affirmed.

Judge SMITH concurs.

Judge PHILLIPS concurs in the result.

MARY FRANCES RINEHART, ADMINISTRATRIX OF THE ESTATE OF JENA CAROL RINEHART, PLAINTIFF v. HARTFORD CASUALTY INSURANCE COMPANY, DALE AMOS GULLEDGE, NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, DEFENDANTS

No. 8819SC69

(Filed 20 September 1988)

1. Insurance § 79— N. C. Insurance Guaranty Association—no obligation to pay amount of insolvent insurer's policy limit

Where plaintiff had already received from solvent automobile insurers an amount equal to an insolvent insurer's policy limits, the N. C. Insurance Guaranty Association had no obligation to pay on plaintiff's claim pursuant to N.C.G.S. § 58-155.48(a)(1) and N.C.G.S. § 58-155.52(a), and there was no distinction between primary and secondary coverage or between an operator's policy and an uninsured motorists provision.

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2. Insurance § 69— settlement with tortfeasor without insurer's consent—no prejudice

Since defendant insurance company waived its rights to subrogation for the payment of uninsured and underinsured motorists claims, it suffered no prejudice by plaintiff's signing of a settlement with the tortfeasor without defendant's consent and it was therefore required to recognize plaintiff's claim for underinsurance coverage.

APPEAL by plaintiff and defendant from *DeRamus, Judson D., Jr., Judge*. Judgments entered 2 October 1987 and 12 October 1987 in Superior Court, ROWAN County. Heard in the Court of Appeals on 7 June 1988.

Carlton, Rhodes and Carlton by Gary C. Rhodes for plaintiff appellant-appellee.

Hedrick, Eatman, Gardner & Kincheloe by Gregory C. York for defendant appellant-appellee, Hartford Casualty Insurance Company.

Moore & Van Allen by Joseph W. Eason, George M. Teague and John G. McJunkin for defendant appellee, North Carolina Insurance Guaranty Association.

COZORT, Judge.

Plaintiff filed a wrongful death claim after her daughter's death. She then filed this declaratory judgment action to determine the amount of coverage due under insurance policies applicable to the claim. The trial court entered an order of summary judgment in favor of defendant North Carolina Insurance Guaranty Association, and plaintiff appeals. The trial court entered an order of summary judgment in favor of plaintiff and against defendant Hartford Casualty Insurance Company, and defendant Hartford appeals. We affirm.

On 6 September 1985, Jena Carol Rinehart, plaintiff's daughter (hereinafter "Rinehart"), was a passenger in a 1978 Dat-sun owned by Dale Amos Gulledge and operated by John Michael Snyder. While driving on Klumac Road in Rowan County, North Carolina, Snyder lost control of the car and caused an accident which killed him and Rinehart.

At the time of the accident, Gulledge had a policy of liability insurance with Iowa National Mutual Insurance Company (Iowa

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National) which provided \$50,000.00 of liability coverage for bodily injuries to or the death of one person. On 10 October 1985, Iowa National was declared insolvent. Pursuant to N.C. Gen. Stat. § 58-155.41, the North Carolina Insurance Guaranty Association (NCIGA) succeeded to its interests.

The driver of the vehicle, Snyder, had an automobile liability insurance policy with Maryland Casualty Company (Maryland Casualty) which provided the minimum statutory coverage of \$25,000.00 for bodily injury to or the death of one person. Maryland Casualty paid plaintiff the full policy limits, \$25,000.00, in return for plaintiff's execution of a Covenant Not to Enforce Judgment against Snyder's estate.

Rinehart had uninsured motorists coverage under her own automobile policy issued by Aetna Life and Casualty Company (Aetna). Aetna paid plaintiff \$25,000.00, the full amount of Rinehart's uninsured motorists coverage.

At the time of the accident, Rinehart resided with her parents and was covered under a family automobile liability insurance policy issued to her parents by Hartford Casualty Insurance Company (Hartford). This policy provided her parents and all members of their household with uninsured and underinsured motorists coverage up to \$100,000.00 for bodily injuries to or the death of one person.

On 31 December 1985, plaintiff filed a wrongful death action on Rinehart's behalf and on 12 June 1986 served a copy of the complaint and summons on defendant Hartford. When Hartford failed to appear or defend, plaintiff filed the present declaratory judgment action to construe the language of all automobile liability insurance policies applicable to the wrongful death action and to determine if Hartford's policy provided underinsured motorists coverage.

Once the declaratory judgment action was filed, defendant NCIGA filed a motion for partial summary judgment on the ground that it had no obligation to plaintiff according to the Insurance Guaranty Association Act. Plaintiff filed a motion for summary judgment against Hartford on the ground that Hartford's policy provided coverage on the subject claim. From the order granting NCIGA's motion for partial summary judgment,

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plaintiff appeals. From the order granting summary judgment in plaintiff's favor against Hartford, defendant Hartford appeals.

[1] Plaintiff's sole argument on her appeal is that the trial court erred in granting partial summary judgment in favor of defendant NCIGA. We disagree.

"A motion for summary judgment may be granted only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law." *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E. 2d 287, 290 (1978).

Section 58-155.42 provides that the purpose of the Insurance Guaranty Association Act is

to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policy-holders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers.

N.C. Gen. Stat. § 58-155.42 (1982). Insurers licensed to transact business in North Carolina "shall be and remain members of the Association as a condition of their authority to transact insurance in this State." N.C. Gen. Stat. § 58-155.46 (Supp. 1987). When a member insurer becomes insolvent, the Association is "obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency In no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises." N.C. Gen. Stat. § 58-155.48(a)(1) (Supp. 1987). Recovery from the Association, however, is limited by the following statutory provision:

(a) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his rights under such policy. Any amount payable on a covered claim under this Article shall be reduced by the amount of any recovery under such insurance policy.

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N.C. Gen. Stat. § 58-155.52(a) (1982).

In this case, Iowa's policy provided coverage up to \$50,000.00 for bodily injuries to or the death of one person. Before proceeding with her claim against Iowa, plaintiff exhausted her claims against solvent insurers as required by § 58-155.52(a). Plaintiff recovered \$25,000.00 from Maryland Casualty under the operator's policy of insurance and another \$25,000.00 from Aetna under its uninsured motorists provision. Since plaintiff has already received from solvent insurers an amount equal to the insolvent insurer's policy limits, we find that NCIGA has no obligation to pay on plaintiff's claim. Plaintiff contends that the \$25,000.00 paid by Aetna was secondary coverage because it was paid under an uninsured motorists provision and is therefore exempt from the limitations of § 58-155.52(a). We disagree.

Section 58-155.52 provides that any liability under this Act is reduced by the amount of "any recovery" under *any* policy of a solvent insurer. N.C. Gen. Stat. § 58-155.52 (Supp. 1987). The statute does not distinguish between primary and secondary coverage or between an operator's policy and an uninsured motorists provision. Since plaintiff has already recovered \$50,000.00, an amount equal to Iowa's policy limits, she no longer has a claim against NCIGA. We hold that the trial court properly granted summary judgment in favor of NCIGA.

[2] Defendant Hartford argues in its appeal that the trial court erred in granting plaintiff's motion for summary judgment. We disagree.

Section 20-279.21(b)(4) provides in part:

The insurer shall not be obligated to make any payment because of bodily injury to which underinsured motorist insurance coverage applies and that arises out of the ownership, maintenance, or use of an underinsured highway vehicle until *after* the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements, and provided the limit of payment is only the difference between the limits of the liability insurance that is applicable and the limits of the underinsured motorist coverage as specified in the owner's policy. [Emphasis added.]

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N.C. Gen. Stat. § 20-279.21(b)(4) (1987). Pursuant to this statute, plaintiff exhausted all other available coverage before filing an underinsured motorists claim with defendant Hartford. Defendant Hartford argues that its policy no longer provides coverage because of the following provision:

PART C—UNINSURED MOTORISTS COVERAGE

....

Exclusions

- A. We do not provide Uninsured Motorists Coverage for property damage or bodily injury sustained by any person:
 1. If that person or the legal representative settles the bodily injury or property damage claim without our written consent.

Defendant Hartford contends that the Covenant Not To Enforce Judgment signed by plaintiff constituted a settlement to which it did not consent and which now relieves Hartford of its duty to provide coverage. We do not agree.

The purpose of the no-consent-to-settlement provision is to give defendant Hartford notice of any payments by the tortfeasor so that it may protect its subrogation rights. Defendant Hartford has waived its subrogation rights for underinsured motorists payments under Part F of the subject policy which provides:

Our Right to Recover Payment

- A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:
 1. Whatever is necessary to enable us to exercise our rights; and
 2. Nothing after loss to prejudice them.

However, our rights in this paragraph do not apply under:

1. Parts B and C; [Uninsured Motorists Coverage].

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Since defendant Hartford has waived its rights to subrogation for the payment of uninsured and underinsured motorists claims, it has suffered no prejudice by plaintiff's noncompliance with the notice provisions of the policy. When notice requirements are involved in a policy of insurance, "the question becomes whether the insurer has been prejudiced by the delay in receiving notice." *Great Am. Ins. Co. v. C. G. Tate Constr. Co.*, 303 N.C. 387, 394, 279 S.E. 2d 769, 773 (1981).

This equitable approach to the interpretation of notice requirements in insurance contracts has the advantages of providing coverage whenever in the reasonable expectations of the parties it should exist and of protecting the insurer whenever failure strictly to comply with a condition has resulted in material prejudice.

Id. at 396, 179 S.E. 2d at 775. Since defendant Hartford suffered no prejudice because of plaintiff's failure to comply fully with the policy provisions, it must recognize plaintiff's claim.

We addressed this same issue in *Branch v. Travelers Indemnity Co.*, 90 N.C. App. 116, 367 S.E. 2d 369 (1988). In that case, plaintiff's intestate was killed in an automobile accident. Plaintiff recovered \$50,000.00 from the negligent operator's policy in exchange for a Covenant Not to Sue the tortfeasor's estate. When plaintiff filed a claim under an underinsured motorists policy, defendant insurance company denied coverage on the ground that the Covenant Not to Sue violated the policy's no-consent-to-settlement provision. Defendant also argued that the covenant nullified its subrogation rights against the tortfeasor, even though its policy renounced subrogation rights against underinsured motorists. This Court stated that, although plaintiff failed to comply with the consent-to-settlement provision, defendant "was not prejudiced by this noncompliance in view of its renunciation of all subrogation right in an underinsurance context," *id.* at 119, 367 S.E. 2d at 371, and that defendant was not relieved of its obligation to pay underinsurance coverage. Accordingly, we find that defendant Hartford is obligated to honor plaintiff's claim and that the trial court properly granted summary judgment in plaintiff's favor.

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Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. ANTHONY GENERAL AND JAMES ROBESON

No. 8816SC154

(Filed 20 September 1988)

1. Criminal Law § 76.2— voir dire hearing—no questioning of witness allowed—defendant not prejudiced

The trial court did not err by denying one defendant the right to cross-examine or question a police officer or to present evidence during a voir dire hearing, since there was no statement made by defendants to the witness, and there was therefore no attempt to introduce any evidence that even required a voir dire hearing; the trial court proceeded to allow a voir dire on the admissibility of certain exhibits, although there had been no request to do so, but the court ended the voir dire before one defendant's counsel had a chance to question the witness; and no undue prejudice could have occurred thereby because a voir dire was not necessary at that point, and defendants had a later opportunity to object to admission of the exhibits, which were in fact admissible.

2. Criminal Law § 162— hearsay evidence—similar evidence subsequently admitted without objection

Defendants could not complain that the trial court improperly admitted hearsay evidence with regard to ownership of a car where similar evidence was subsequently admitted without objection.

3. Criminal Law § 45— bolt cutters—experimental evidence admissible

In a prosecution of defendants for possession of implements of house-breaking, the trial court did not err in admitting testimony concerning an experiment with a pair of bolt cutters; furthermore, a proper foundation was laid for admission of the bolt cutters where the witness adequately identified the bolt cutters as those found at the crime scene.

4. Criminal Law § 61.2— shoe print evidence—admissibility

In a prosecution of defendants for possession of implements of house-breaking and attempted breaking or entering, the trial court did not err in admitting testimony concerning shoe print comparison evidence.

5. Criminal Law § 34— testimony by officer that he knew defendant by another name—evidence prejudicial

The trial court erred in allowing into evidence testimony by a police officer that he knew one defendant by another name, that defendant's fingerprints matched those of another individual, and that the officer knew defend-

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ant as that individual from another county, since the identity of defendants was not in question in this case and the testimony was not admissible under N.C.G.S. § 8C-1, Rule 404(b) to show identity, and since the testimony implied the commission of other crimes or wrongs by defendant. Even if the testimony did not present evidence of other crimes, wrongs or acts prohibited by Rule 404(b), it was irrelevant and unduly prejudicial.

APPEAL by defendants from *Lewis (John B.), Judge*. Judgments entered 16 September 1987 in Superior Court, ROBESON County. Heard in the Court of Appeals 7 September 1988.

This is a criminal action wherein each defendant was charged in proper bills of indictment with "hav[ing] in his possession implements of housebreaking . . ." in violation of G.S. 14-55 and with attempted breaking or entering in violation of G.S. 14-54(b). At trial, evidence was presented which tends to show:

Jerry King, owner of a pawnshop and movie rental store, closed his business at 5:00 p.m. on 28 May 1987, and left for the day. Later that night, Sergeant James Edwards of the Red Springs Police Department checked the rear door of King's business while on routine foot patrol. Finding nothing wrong with the shop's door or any other door in the downtown area, Edwards returned to the police station and got his police vehicle.

Edwards later returned downtown, and he drove by the well-lit alley where the rear door of King's business was located. He saw two males, one taller than the other, walking out of the alley in the other direction. He stopped his car and walked down the alley where he noticed the rear door of King's business was damaged. The lock was dented and the steel plate was bent away from the surface of the door. Along with Officer Carl Pearson, he searched the area at about 1:00 a.m. He then saw a car parked in a church driveway nearby and called for a check of ownership.

Two blocks from the car, Edwards found defendants, who matched the height of the men he had seen earlier. After questioning defendants, Edwards took them to the police station. He later returned to the scene with defendants' shoes and compared them to shoe prints around the car and King's business. The prints matched, but later attempts at making plaster casts of the prints failed. The car was found to be registered to Tommy General, defendant General's brother, and Tommy General's driver's license was found in the car. In a dumpster near the

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pawnshop's rear door, the officers found a blue jacket, a pair of bolt cutters and a pair of gloves.

During the trial, Officer John Trogdon of the Fayetteville Police Department testified that he knew defendant Robeson as Victor Lee Ford and that he knew him from Cumberland County. Trogdon, a fingerprint expert, testified that the fingerprints of Victor Lee Stephens Ford matched those of defendant Robeson. He compared a card with a fingerprint labeled Victor Lee Stephens Ford to a card with a fingerprint labeled James Robeson and said that "[t]he individual in question made the impression on both cards."

Defendants presented no evidence. The jury found defendants guilty on all counts. Defendant General was sentenced to five years imprisonment for possession of implements of housebreaking and two years imprisonment for attempted breaking or entering. Defendant Robeson was sentenced to seven years imprisonment for possession of implements of housebreaking and two years for attempted breaking or entering. Defendants appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. David Steinbock, for the State.

Earl H. Strickland for defendant, appellant Anthony General.

William L. Davis, III, for defendant, appellant James Robeson.

HEDRICK, Chief Judge.

[1] Defendants first contend the trial court erred by denying defendant Robeson the right to cross-examine or question Sergeant Edwards or to present evidence during a voir dire hearing. At trial, when Sergeant Edwards was asked on direct examination by the prosecutor whether he questioned defendants, defendant Robeson's counsel requested a voir dire hearing. The trial judge asked defendant Robeson's counsel what the purpose of the voir dire was, and counsel responded, ". . . I didn't know what he was getting ready to say about the statements. . . . He was getting ready to say what he said after he advised him of his rights." The purpose of the request for a voir dire hearing was clearly to determine admissibility of statements made by defendants while in custody. Such a hearing is required, when requested, before

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such evidence is admissible. *State v. Catrett*, 276 N.C. 86, 171 S.E. 2d 398 (1970).

In this case, however, there was no statement made by defendants to the witness, and there was therefore no attempt to introduce any evidence that even required a voir dire hearing. When the trial judge was satisfied that no statement was to be offered, he properly ended the voir dire as to such statements.

The trial judge then proceeded to allow a voir dire on the admissibility of certain exhibits, although there had been no request to do so. At this point in the trial, no connection had been made between the exhibits and defendants. The trial judge ended the voir dire before defendant Robeson's counsel had a chance to question the witness. No undue prejudice could have occurred due to this because a voir dire was not necessary at that point because defendants had a later opportunity to object to admission of the exhibits, and because the exhibits were in fact admissible. As the trial judge stated, the questions asked during voir dire could have been asked in the presence of the jury on cross-examination. This assignment of error has no merit.

[2] Defendants next argue the trial court erred by admitting hearsay testimony of Sergeant Edwards. Sergeant Edwards testified that he was told over the police radio that the car he saw parked near the crime scene was registered to defendant General's brother. Assuming *arguendo* that this was improperly admitted hearsay, the same evidence of the car's ownership was later admitted without objection when Sergeant Edwards testified defendant General told him the car belonged to his brother. It is well-settled that where evidence is admitted over objection, and the same evidence is later admitted without objection, the benefit of the objection is lost. *State v. Whitley*, 311 N.C. 656, 319 S.E. 2d 584 (1984). Defendants' argument is meritless.

[3] Defendants also argue the trial court committed error by admitting into evidence testimony concerning an experiment with a pair of bolt cutters. Experimental evidence is admissible "when the trial judge finds it to be relevant and of probative value." *State v. Jones*, 287 N.C. 84, 98, 214 S.E. 2d 24, 34 (1975). It is clear the trial judge here correctly found the experiment which compared the bolt cutters to dents made in the pawnshop's door was relevant and of probative value. Defendants further contend,

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however, that the trial court erred because no proper foundation was laid for admission of the bolt cutters into evidence. We disagree. Although a chain of custody is required, *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984), the witness here adequately identified the bolt cutters as those found at the scene. Any weakness in the chain of custody goes to the weight of the evidence rather than the admissibility. *State v. Brooks*, 83 N.C. App. 179, 349 S.E. 2d 630 (1986). Defendants were in no way unduly prejudiced by admission of this evidence.

Defendants also argue the other exhibits were improperly admitted since no proper foundation was laid. Upon review of the record, we find that Exhibits 1, 2, 1A and 1B were identified and that testimony indicated there had been no material change in them between their seizure and the time of trial. Therefore, under *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984), there was sufficient foundation for admission of the exhibits.

[4] Defendants also contend the trial court erred by admitting testimony concerning shoe print comparison evidence. Sergeant Edwards and Officer Pearson were permitted to testify that shoe prints at the pawnshop and near the car matched those of defendants' shoes. A non-expert may testify as to shoe print comparisons. *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981). Defendants argue, however, this evidence is the only evidence connecting them to the crime, and therefore they challenge the sufficiency of the evidence.

When the sufficiency of evidence is challenged, there must be a determination of whether there is substantial evidence of each element of the offenses charged and evidence that the defendant committed the crime. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). Upon review of the record, we find there is substantial evidence of each element of the offenses. As for evidence that defendants were the perpetrators, defendants argue the test first stated in *State v. Palmer*, 230 N.C. 205, 52 S.E. 2d 908 (1949), should apply. In *Palmer*, our Supreme Court said shoe print evidence had "no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless" there were certain requirements met: "(1) that the shoemarks were found at or near the place of the crime; (2) that the shoemarks were made at the time of the crime; and (3) that the shoemarks correspond to shoes

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worn by the accused at the time of the crime." *Id.* at 213-14, 52 S.E. 2d at 913. These circumstances test the weight of the evidence. *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981). In this case, when the shoe print evidence is considered along with other evidence, there is enough to submit the case to the jury. This argument is without merit.

[5] Finally, defendants argue Exhibits 3 and 4 were improperly admitted, and that testimony of Officer Trogdon concerning the exhibits should have been excluded by the trial court. Trogdon's testimony consisted of comparing fingerprints taken from defendant Robeson to those of Victor Lee Stephens Ford. Trogdon testified the fingerprints matched and that he knew Robeson as Victor Ford from Cumberland County. Defendants contend this was evidence of defendant Robeson's prior bad character and reputation, and therefore inadmissible. At trial, the prosecutor contend ed the testimony was admissible under G.S. 8C-1, Rule 404(b) and that it was offered "to show the identity of the defendant." The trial court admitted the testimony for this purpose. G.S. 8C-1, Rule 404(b) provides:

Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

The State now argues on appeal that the testimony is not evidence of defendant Robeson's bad character or reputation, and that "there was no evidence presented of other 'crimes, wrongs, or acts' . . ." The State further argues that if this Court does find the testimony to be evidence of "crimes, wrongs, or acts," that the Rule 404(b) identity exception should be applied.

It is unclear for what purpose the prosecutor elicited the testimony of Officer Trogdon. An inference that can be drawn from the testimony of this Fayetteville police officer who knew defendant Robeson by an alias is that he had been involved in some other crime or that he used other names for some illegal purpose. The contention that the testimony is admissible for purposes of identity under Rule 404(b) is without basis. It was clear at trial

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who was being tried and witnesses specifically identified defendant Robeson. There was no evidence presented that defendant Robeson ever gave a different name to anyone. The only mention of his use of the name Victor Ford before Trogdon's testimony was by the prosecutor during voir dire of the jury before any evidence was presented. There was no question of identity and for this reason, the testimony should not have been admitted under Rule 404(b).

Even if the testimony did not present evidence of "other crimes, wrongs, or acts," it was irrelevant and unduly prejudicial. We cannot say the outcome of defendant Robeson's trial would have been the same absent the testimony of Trogdon. For that reason, we remand defendant Robeson's case to the Superior Court of Robeson County for a new trial.

Defendant General also contends when the trial court allowed the testimony of Officer Trogdon it committed error with regard to him. We disagree. The testimony dealt only with defendant Robeson and not with defendant General. The evidence presented was not unduly prejudicial to defendant General. *See State v. Anderson*, 208 N.C. 771, 182 S.E. 2d 643 (1935). For this reason, there was no error in defendant General's trial.

The result with respect to defendant General is no error; with respect to defendant Robeson, new trial.

Judges ARNOLD and WELLS concur.

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LAWYERS TITLE INSURANCE CORPORATION, JOE H. LEONARD AND WIFE, REBECCA LEONARD, JOSEPH R. SALEM AND WIFE, AMELIA N. SALEM, EDWARD B. CASSADA AND WIFE, RAMONA S. CASSADA, GEORGE THOMAS LOVELACE, JR. AND WIFE, BETTY JO TURNER, THOMAS RILEY MCNEILL AND WIFE, MARY ANN MCNEILL v. BEN I. LANGDON, RALPH L. THOMAS, JR., SHERIFF OF CARTERET COUNTY, NORTH CAROLINA, B.W.T. ENTERPRISES, INC., AND BARBOUR CONSTRUCTION COMPANY

No. 883SC38

(Filed 20 September 1988)

1. Rules of Civil Procedure § 60— plaintiffs not parties to original suit — action for relief from judgment unavailable

Plaintiff owners of condominium units who were adversely affected by a judgment lien in defendant's favor could not bring an action under N.C.G.S. § 1A-1, Rule 60(b) for relief from the judgment, since they were never made parties to the original suit; rather, the only avenue open to them was to file an independent action directly attacking the judgment as it affected their interest.

2. Rules of Civil Procedure § 15— action against corporate defendants for monetary judgment — amendment of complaint to enforce lien against individuals improper

Defendant could not seek a monetary judgment against two corporate defendants in his original complaint, then amend the complaint to include an action to enforce a lien against individuals, non-parties to the original complaint, whose property interest had never been a subject of the suit. N.C.G.S. § 1A-1, Rule 15(c).

APPEAL by defendant from *Phillips, Herbert O., III, Judge*. Order entered 11 September 1987 in Superior Court, CARTERET County. Heard in the Court of Appeals 5 May 1988.

Stanley & Simpson, by John P. Simpson, for plaintiffs-appellees.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for defendant-appellant.

JOHNSON, Judge.

Plaintiffs, Lawyers Title Insurance Corporation, the title insurer of the real property which is the subject of this dispute, and several individual owners of condominium units, instituted this civil action to prevent a judicial sale of their condominium units to satisfy a lien upon the property. The lien was attached pur-

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suant to a judgment obtained by one of the defendants in the instant case, Benjamin I. Langdon, a contractor who constructed the units in question. The pertinent underlying facts appear as follows.

Benjamin I. Langdon entered into a contract with B.W.T. Enterprises, Inc. and Barbour Construction Company to perform certain services for the construction of condominium units on the property owned by B.W.T. Enterprises, Inc. and Barbour Construction Company, located in Carteret County, North Carolina. A dispute arose over the payment of funds which Langdon contend-ed were owed to him. Langdon then filed notice of a claim of lien against all condominium units and properties known as the Queen's Court Condominium Project at Emerald Isle. This is the same property which the plaintiffs in this action now own individ-ually. The claim of lien was filed on 2 October 1985, within 120 days of the last date of the furnishing of labor and materials.

On 21 October 1985, Langdon filed a complaint (85CVS819) against B.W.T. Enterprises, Inc. and Barbour Construction Com-pany, who are the same parties set forth in the claim of lien. The complaint also refers to the Queen's Court Condominium Project at Emerald Isle and alleges that the conflict arose over the con-struction of the condominium units. The amount of damages prayed for is the same amount which is stated in the claim of lien.

On 18 November 1986, the case came on for trial. At trial no one appeared on behalf of the defendants. The trial court inquired as to whether notice had been given to defendants and proceeded after having become satisfied that defendants had been given no-tice. Langdon then made a motion to amend the complaint to in-clude a claim of lien, and asked the court to allow the amendment in order to enforce the claim of lien filed 2 October 1985. The trial court granted his motion. On the same date, the judgment was en-tered in favor of Langdon.

No appeal was taken from the judgment nor was any action brought pursuant to G.S. sec. 1A-1, Rule 60(b) for relief from the judgment. After the judgment was filed, Langdon directed the sheriff of Carteret County to begin sale proceedings to have a ju-dicial sale pursuant to the execution issued by Langdon to satisfy his judgment. The sale for one of the condominium units which would have been subject to the lien was set for 29 May 1987.

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On 11 May 1987, plaintiffs filed the complaint in this case alleging, *inter alia*, that defendants, Langdon, B.W.T. Enterprises, Inc., and Barbour Construction Company knew, or should have known, that the condominium units had been sold to the individual plaintiffs long before the trial of their suit on 18 November 1986. They further alleged that the plaintiffs had substantial rights and interests in the condominium units and should have been made parties to the original suit prior to trial, if the parties to the original suit intended to litigate the enforcement of the claim of lien. Plaintiffs sought: (1) to have the prior judgment entered on 18 November 1986 in Langdon's favor, declared void *ab initio*; (2) to have the claim of lien declared void and of no force or effect; and (3) to restrain Langdon from proceeding with the execution upon the plaintiffs' properties pursuant to the 18 November 1986 judgment. The plaintiffs also demanded relief from Langdon in an amount in excess of \$10,000.00.

On that same date, plaintiffs also filed a motion for a temporary restraining order to enjoin "[d]efendants and all those in active concert or participation with them from proceeding further with judicial execution" or sale of the disputed property. Plaintiffs' motion for a temporary restraining order was allowed on 26 May 1987, enjoining defendants from proceeding further in executing upon the judgment pending adjudication of the action upon the merits.

On 11 September 1987, plaintiffs filed a motion for summary judgment which was granted, except as to the issue of damages. The court declared the claim of lien void and of no force or effect. The judgment entered on 18 November 1986 was also declared void and of no force or effect but only as it relates to the enforcement of the lien on plaintiffs' condominium property pursuant to G.S. sec. 44A-13. The remaining terms and conditions were declared to remain in full force and effect.

From this judgment defendant Langdon gave notice of appeal.

[1] Defendant assigns as error the trial court's decision to allow plaintiffs' motion for partial summary judgment, and declaring the claim of lien void and the judgment entered on 18 November 1986 void and of no force or effect as it relates to the enforcement of the lien.

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G.S. sec. 1A-1, Rule 56(c) provides in part that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Defendant contends that the partial summary judgment should have been denied since there was a genuine issue, maintained by substantial evidence, as to a material fact. He argues that the genuine issue is whether the plaintiffs should have brought their action pursuant to G.S. sec. 1A-1, Rule 60(b) for relief from the judgment, instead of filing an independent action to attack the judgment.

G.S. sec. 1A-1, Rule 60(b) allows relief from a final judgment or order to a party or his legal representative, upon motion, where the party demonstrates a flaw in the judgment based upon mistake, inadvertence, excusable neglect or other enumerated conditions. The plaintiffs in the case *sub judice* were never made parties to the original Langdon suit against B.W.T. Enterprises, Inc. and Barbour Construction Company; therefore, plaintiffs were excluded from using G.S. sec. 1A-1, Rule 60(b) in order to attack the judgment, since G.S. sec. 1A-1, Rule 60(b) does not apply to non-parties or strangers to the action giving rise to the judgment or order. *Browne v. Catawba County Dept. of Social Services*, 22 N.C. App. 476, 206 S.E. 2d 792 (1974). The only option or method of defense available to plaintiffs, was to file an independent action to directly attack the judgment as it affected their interests. The judgment had to appear void on its face for a direct attack to be proper. *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E. 2d 566 (1977). If the judgment does not appear void upon its face, then the plaintiff must allege facts which, if corroborated by competent evidence, would render an apparently valid judgment a nullity. *Id.*

[2] The defendant, Langdon (plaintiff in the original action), sought to amend his original complaint, in which he sought monetary damages only from B.W.T. Enterprises, Inc. and Barbour Construction, to include an entirely new cause of action for the enforcement of a lien pursuant to G.S. sec. 44A-13(a). His motion to amend the complaint was allowed, however, notice was not

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given to plaintiffs concerning the enforcement of said lien until after the judgment was entered. At this time, the plaintiffs, who were non-parties to the original suit, suddenly found their rights adversely affected without having had an opportunity to present their objections and defenses.

The power of the court to continue to entertain independent actions as before is also important in preserving the relief afforded to those who are strangers to an action since 60(b) limits relief to the parties. If a stranger is able to show prejudice to some pre-existing right belonging to him, then he may attack a judgment by independent action.

Shuford, North Carolina Civil Practice and Procedure sec. 60-17 (2d ed. 1981).

Defendant argues that his complaint contained all the essential elements to establish a G.S. sec. 44A-13 claim and was sufficient to give notice to the plaintiffs despite no mention of a lien or its enforcement in his original complaint. He further argues that there was no prejudice shown and that the amended pleading concerning the enforcement of the lien is not void since the lien was filed and recorded at the Carteret County Register of Deeds, thereby putting all parties on notice, at least constructive notice, that the lien was claimed by him. The trial court found that Langdon's original claim was for a personal monetary judgment based on a breach of contract and "contain[ed] no causes of action pertaining to the enforcement of the aforesaid liens, [made] no mention of said lien, and [did] not purport to be an action filed pursuant to G.S. sec. 44A-13 in order to enforce a lien."

Defendant also contends that the amendment would relate back to the original complaint pursuant to G.S. sec. 1A-1, Rule 15(c) because the motion to amend was filed within the statutory period allowed for bringing an action to enforce a lien and that the amendment "merely amplifies the old cause of action." *Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E. 2d 240 (1984).

G.S. sec. 1A-1, Rule 15(c) provides that:

[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original proceeding was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transac-

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tions or occurrences, to be proved pursuant to the amended pleading.

Amending a claim for a monetary award, to include a G.S. sec. 44A-13 claim to enforce a lien against non-parties without allowing any type of notice, does not fall within the reasonable interpretation of G.S. sec. 1A-1, Rule 15(c). Whether an amended complaint will relate back to the original complaint depends upon whether the original pleading gives defendants sufficient notice of the proposed amended claim. *Mauney v. Morris*, 316 N.C. 67, 340 S.E. 2d 397 (1986). To allow defendant to amend his complaint without giving notice would violate due process and prejudice plaintiffs' rights.

The defendant, Langdon, cannot seek a monetary judgment against two corporate defendants in his original complaint, then amend the complaint to include an action to enforce a lien against individuals, non-parties to the original complaint, whose property interests had never been a subject of the suit. G.S. sec. 1A-1, Rule 15(c) does not allow a plaintiff to abandon one cause and its relief against one set of defendants, and amend that complaint to create a new relief against a group of non-party strangers and their interests. See *Estrada, supra*.

Based upon the evidence presented, the trial court did not err in granting plaintiffs partial summary judgment. In light of our holding, it is not necessary to address the issue of whether defendant's amendment was filed within the statutory limitation period, since the individual plaintiffs never received notice of the amended complaint.

Judgment is therefore

Affirmed.

Judges PHILLIPS and SMITH concur.

Jenkins v. Aetna Casualty & Surety Co.

WILLIAM W. JENKINS v. AETNA CASUALTY AND SURETY COMPANY

No. 8711SC1210

(Filed 20 September 1988)

Insurance § 85— wife as insured—automobile in which husband had equitable interest—liability coverage excluded—vehicle not “covered” auto

In an action where plaintiff sought to have defendant satisfy a judgment entered against a named driver who plaintiff contended was defendant's insured under a policy of automobile liability insurance, the trial court properly granted summary judgment for defendant upon findings that the driver's wife was the named insured on the insurance policy; though the driver was a "covered person," liability coverage was excluded because he had an equitable interest in the vehicle in question which was sufficient to make him, rather than his wife, the "owner" of the vehicle; and the vehicle was not a covered auto under the policy because neither the driver nor his wife complied with the provision of the insurance policy to assure that the car became a covered vehicle. N.C.G.S. § 20-4.01(26).

Judge PHILLIPS dissenting.

APPEAL by plaintiff from Johnson, E. Lynn, Judge. Judgment entered 9 November 1987 in Superior Court, LEE County. Heard in the Court of Appeals 3 May 1988.

Moretz & Silverman, by Jonathan Silverman, for plaintiff-appellant.

Pope, Tilghman, Tart & Taylor, by Ann C. Taylor and Johnson Tilghman, for defendant-appellee.

JOHNSON, Judge.

This is a civil action wherein plaintiff seeks to have defendant satisfy a judgment entered against William Troy Patterson, who plaintiff contends is defendant's insured under a policy of automobile liability insurance.

On 18 October 1985, plaintiff, William W. Jenkins, was injured in a one-car collision while a passenger in a 1967 Chevrolet Camaro operated by William Troy Patterson. On 5 December 1986, judgment was entered against Patterson for damages in the amount of \$17,197.99 sustained by Jenkins in the collision.

At the time of the collision on 18 October 1985, Kelly Ann Tillman [sic] was the named insured on an automobile liability in-

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surance policy issued by defendant, Aetna. (Her correct name is Kelly Ann Tilghman Patterson.) Also, at that time, Kelly Ann Tilghman Patterson was married to William Troy Patterson. They resided in the same household, and the policy was in full force and effect. Two automobiles, an Opel and a Buick, were listed on the declarations page of the insurance policy, but the vehicle involved in the accident, the Camaro, was not listed.

On 21 September 1983, Patterson purchased the Camaro from a man known as "Junior" for \$400.00 and obtained possession of the car at that time. However, the owner of the car at the time of sale was Jerome Hall. When it was acquired, the car had no motor and was obtained primarily for restoration and not transportation purposes. The seller did not own the car and did not have a certificate of title for the car. Patterson never received a certificate of title for the car and did not attempt to get insurance coverage on the car.

Prior to 18 October 1985, Patterson had never driven the car. When the collision occurred, Patterson was driving the car from Wesley's garage to his home which was three to four miles away. The car was being taken home for further repairs and not for transportation purposes. The car did not have a license plate.

Plaintiff, William W. Jenkins, commenced this civil action against defendant, Aetna Casualty Company, on 23 February 1987. Defendant filed answer on or about 11 May 1987. On 29 September 1987 and on or about 28 October 1987, plaintiff and defendant, respectively, filed motions for summary judgment. On 9 November 1987, the trial court denied plaintiff's motion and granted defendant's motion for summary judgment. Plaintiff appealed.

Plaintiff brings forth two arguments for this Court's review. For the following reasons, we affirm. He contends that the trial court erred by granting defendant's motion for summary judgment and by denying plaintiff's motion for summary judgment. In support of these contentions, plaintiff argues that the undisputed evidence reveals that William Troy Patterson was a covered person under defendant Aetna's policy of automobile liability insurance issued to Kelly Ann Tillman (Tilghman) and that none of the policy exclusions apply which would entitle Aetna to deny coverage. In the alternative, plaintiff contends that a genuine is-

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sue of material fact exists as to whether the Camaro was furnished for Patterson's regular use. We disagree.

The applicable provision of the automobile liability insurance policy defines "covered auto" as follows:

1. Any vehicle shown in the Declarations.
2. Any of the following types of vehicles on the date you become the owner:
 - a. a private passenger auto, . . .

If the vehicle you acquire replaces one shown in the Declarations, it will have the same coverage as the vehicle it replaced.

If the vehicle you acquire is in addition to any shown in the Declarations, it will have the broadest coverage we now provide for any vehicle shown in the Declarations, if you:

- a. acquire the vehicle during the policy period; and
- b. ask us (Aetna) to insure it:
 - (1) during the policy period; or
 - (2) within 30 days after you become the owner.

Furthermore, the policy, in pertinent part, provides as follows:

DEFINITIONS

Throughout this policy, "you" and "your" refer to:

1. The "named insured" shown in the Declarations; and
2. The spouse if a resident of the same household.

"Family member" means a person related to you by blood, marriage or adoption who is a resident of your household.

PART A - LIABILITY COVERAGE

We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident.

"Covered person" as used in this Part means:

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1. You or any family member for the ownership, maintenance or use of any auto or trailer.

EXCLUSIONS

- B. We do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle, other than your covered auto, which is:

- a. owned by you; or
 - b. furnished for your regular use.

2. Any vehicle, other than your covered auto, which is:

- a. owned by any family member; or
 - b. furnished for the regular use of a family member.

First, we note that the Camaro is not a covered auto under the policy because neither William Troy Patterson nor his wife complied with the provision of the insurance policy to assure that the Camaro became a covered vehicle. Patterson purchased the car prior to the policy period and did not notify Aetna during the policy period or within 30 days after having become the owner.

William Troy Patterson is a "covered person" under the statute because he is the spouse of and was residing in the same household with the policyholder at the time of the accident. However, liability coverage is excluded if the Camaro was either owned by William Troy Patterson or was furnished for his regular use.

G.S. sec. 20-4.01(26) defines "owner" as:

A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter.

This definition applies to all of Chapter 20 and to the Financial Responsibility Act unless the context requires otherwise.

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'[F]or purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration' until transfer of legal title is effected as provided in G.S. 20-72(b). The general rule then, as between vendor and vendee, is that the vendee does not acquire 'valid owner's liability insurance until legal title has been transferred or assigned' to the vendee by the vendor.

Roseboro Ford, Inc. v. Bass, 77 N.C. App. 363, 366, 335 S.E. 2d 214, 216 (1985) (citations omitted) (emphasis in original).

However, an exception to this rule was established in *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 298 S.E. 2d 56 (1982), cert. denied, 307 N.C. 698, 301 S.E. 2d 101 (1983), where neither the vendor nor the vendee had legal title subsequent to the sale of the vehicle. Legal title, instead, was transferred simultaneously and in connection with the vendee's purchase of the vehicle, from the vendor to a third party, the vendee's son. The transfer was accomplished at the vendee's direction and without the knowledge or approval of his son. The vendee, however, paid the entire purchase price, had exclusive possession and use of the vehicle, obtained the insurance coverage for it, and paid the premiums therefor. This Court stated that "[t]his sufficed to give him a clear equitable interest in the vehicle, . . . and that equitable interest sufficed, under the particular facts and circumstances, to make him the 'owner' of the vehicle within the coverage intent of the policy, interpreted in light of the purpose and intent of the Financial Responsibility Act." *Id.* at 625, 298 S.E. 2d at 59.

In the case *sub judice*, neither the vendor nor vendee held legal title. The evidence established that the actual owner of the Camaro was Jerome Hall. William Troy Patterson paid a full purchase price for the car and had exclusive possession of the car. However, he did not use the car until the day of the accident and never obtained automobile insurance for the car. The evidence did establish that William Troy Patterson would have obtained insurance when he "got [the car] running right," and did not plan to drive the car until he had made all the necessary repairs.

We believe that under the facts and circumstances of the case *sub judice*, that Patterson had an equitable interest in the

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Camaro which was sufficient to make him the "owner" of the vehicle within the coverage intent of the policy.

Because we have determined that Patterson owned the Camaro, and thus was excluded from liability coverage under the policy, we need not determine whether the Camaro was furnished for his regular use.

Accordingly, for all the aforementioned reasons, the judgment of the trial court is

Affirmed.

Judge SMITH concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the exclusions in defendant's policy do not apply to this case and the order of summary judgment is erroneous, because within the contemplation of the Financial Responsibility Act the Camaro automobile involved was neither owned by William Patterson nor furnished for his regular use.

ARTHUR BENNETT MANNING AND WIFE, LUGENE MANNING v. CLARENCE ERNEST FLETCHER, JR. AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 877SC1136

(Filed 20 September 1988)

Insurance § 69; Master and Servant § 89.4—underinsured motorist coverage—no reduction for workers' compensation payments—subrogation by compensation carrier

Where an employer provided an employee automobile liability and underinsured motorist insurance coverage, and the employee was injured in an automobile accident during the course and scope of his employment, the automobile insurer was not entitled to reduce its underinsured motorist obligation to the employee by the amount of workers' compensation paid to the employee. However, pursuant to N.C.G.S. § 97-10.2(j), the compensation insurer can be subrogated for the amount of workers' compensation paid by it to the employee. N.C.G.S. § 20-279.21(e).

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APPEAL by defendant North Carolina Farm Bureau Mutual Insurance Company from *Brown (Frank R.), Judge*. Judgment entered 26 August 1987 in Superior Court, NASH County. Heard in the Court of Appeals 13 April 1988.

Plaintiff Arthur Manning was injured in an automobile accident on 13 March 1985 sustaining damages in excess of \$100,000. Plaintiff and his wife, Lugene Manning, brought suit against defendant Fletcher for negligence and loss of consortium in excess of \$750,000. Fletcher had liability insurance in the amount of \$25,000 through State Farm Insurance Company. Pursuant to agreement in the pretrial order, State Farm paid plaintiff \$25,000, discharging Fletcher from further liability. Pursuant to the same pretrial order, this \$25,000 was to be distributed to defendant North Carolina Farm Bureau Mutual Insurance Company (hereinafter Farm Bureau) in partial satisfaction of workers' compensation benefits.

Plaintiff's injury occurred in the course and scope of his employment. Through his employer, Devon Edwards, plaintiff had underinsured motorist coverage from defendant Farm Bureau in the face amount of \$100,000. Edwards also maintained separate workers' compensation coverage on his employees through Farm Bureau. Plaintiff received \$59,000 in workers' compensation benefits from Farm Bureau.

On 22 July 1987, an Order on Final Pretrial Conference was signed by counsel for plaintiffs, and defendants Fletcher and Farm Bureau. Said pretrial order adds Farm Bureau as a party defendant, stipulates to defendant Fletcher's liability and release, and converts the action to one for declaratory judgment to determine the extent of Farm Bureau's liability under its underinsured motorist coverage. Judge Frank R. Brown signed the pretrial order on 22 July 1987. Judgment was entered for plaintiff on 26 August 1987, adjudging Farm Bureau's underinsured motorist coverage obligation to plaintiff in the amount of \$75,000 subject to a subrogation claim for \$34,000 in workers' compensation benefits paid to plaintiff. From this judgment Farm Bureau appeals.

Ralph G. Willey, P.A., by Ralph G. Willey, III, attorney for plaintiff-appellees.

Poyner & Spruill, by Ernie K. Murray, attorney for defendant-appellant.

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ORR, Judge.

The sole issue on appeal is whether the trial court erred by not reducing Farm Bureau's underinsured motorist coverage obligation by the total amount of workers' compensation paid to plaintiff.

N.C.G.S. § 20-279.21(b)(4) requires insurers to provide underinsured motorist coverage to the extent that "the limit of payment is only the difference between the limits of the liability insurance that is applicable and the limits of the underinsured motorist coverage as specified in the owner's policy." This effectively limits the payment to the difference between defendant Fletcher's liability coverage (\$25,000) and the limits of defendant Farm Bureau's underinsured motorist coverage as specified in the policy (\$100,000). *See Davidson v. U. S. Fidelity and Guar. Co.*, 78 N.C. App. 140, 336 S.E. 2d 709 (1985), *aff'd per curiam*, 316 N.C. 551, 342 S.E. 2d 523 (1986). Neither defendant Farm Bureau nor plaintiff Manning dispute that the maximum amount of Farm Bureau's liability is \$75,000 under N.C.G.S. § 20-279.21(b)(4).

Farm Bureau argues that the \$75,000 amount may be further reduced by the amount of workers' compensation paid to plaintiff (\$59,000) under its limit of liability provision in its underinsured motorist liability policy with plaintiff's employer.

The policy language in question states:

OUR LIMIT OF LIABILITY

...

2. Any amount payable under this insurance shall be reduced by:

a. All sums paid or payable under any workers' compensation, disability benefits or similar law exclusive of non-occupational disability benefits and

...

Pursuant to the above policy language and other evidence, the trial court made the following findings of fact and conclusions of law:

...

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5. That North Carolina Farm Bureau Mutual Insurance Company, underinsured motorist carrier, is obligated to pay the plaintiffs the difference between the stated limit of the underinsured motorist coverage in its policy of \$100,000.00 and the limit of the liability insurance paid by State Farm Mutual Insurance Company on behalf of the defendant, Fletcher, in the amount of \$25,000.00; that North Carolina Farm Bureau Mutual Insurance Company, as underinsured motorist carrier, is obligated to pay the plaintiffs the sum of \$75,000.00 pursuant to its policy and the North Carolina Vehicle Safety and Financial Responsibility Act, N.C. Gen. Stat. 20-279.21(b)(4).

6. That North Carolina Farm Bureau Mutual Insurance Company is not entitled to reduce its underinsured motorist coverage to the plaintiffs in the amount of \$75,000.00 because of benefits paid to the plaintiff, Arthur Bennett Manning, pursuant to the North Carolina Workers' Compensation Act; that such reduction is not permitted by either N.C. Gen. Stat. 20-279.21(b)(4) or N.C. Gen. Stat. 20-279.21(e) of the North Carolina Motor Vehicles Safety and Financial Responsibility Act.

7. That North Carolina Farm Bureau Mutual Insurance Company, as workers compensation carrier, is entitled to subrogation against the proceeds of the underinsured motorist coverage afforded by North Carolina Farm Bureau Mutual Insurance Company, as the underinsured motorist carrier, up to \$34,000.00, pursuant to N.C. Gen. Stat. 97-10.2 et seq.

. . .

WHEREFORE, it is hereby ordered, adjudged and decreed, that:

. . .

2. The payment of \$25,000.00 by State Farm Mutual Insurance Company to plaintiffs for subsequent distribution to North Carolina Farm Bureau Mutual Insurance Company, workers' compensation carrier, and plaintiffs' counsel is accomplished by agreement of the parties and is not considered under this declaratory judgment action.

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3. North Carolina Farm Bureau Mutual Insurance Company, as underinsured carrier, is obligated to pay the plaintiffs the sum of \$75,000.00, and shall pay said sum to the plaintiffs with interest at the legal rate from the date of this judgment together with the costs of this action.

4. The plaintiffs shall have \$41,000.00 of the \$75,000.00 paid by North Carolina Farm Bureau Mutual Insurance Company, underinsured motorist insurer, free and clear of any claim or lien by any other party to this action; that the plaintiffs are to retain the balance of \$34,000.00, until such time as the Court, in its discretion, shall distribute the \$34,000.00 between the plaintiff, Arthur Bennett Manning, and North Carolina Farm Bureau Mutual Insurance Company, workers' compensation carrier.

. . .

Defendant argues that the limit of liability policy language complies with N.C.G.S. § 20-279.21(e); thus defendant's liability for \$75,000 should be further reduced by the \$59,000 workers' compensation plaintiff received. We disagree.

Under N.C.G.S. § 20-279.21(e) "[s]uch motor vehicle liability policy need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law"

We find little assistance from the courts of this state in interpreting subsection (e). In *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 313 S.E. 2d 856, *disc. rev. denied*, 311 N.C. 306, 317 S.E. 2d 682 (1984), this Court invalidated an employee exclusion clause in an insurance policy which *completely* denied coverage for injury (to any employee) during the scope of employment, and held that under N.C.G.S. § 20-279.21(e), an insurer may not completely exclude an employee from policy coverage unless workers' compensation is available. "[T]he validity of the exclusion is contingent on the existence of workers' compensation." *Id.* at 634, 313 S.E. 2d at 859.

It is important to note that *Smith* was a general auto liability insurance case which stated that if there was a showing of workers' compensation coverage for the employee, the employer could exclude any coverage under his liability policy.

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In the case *sub judice*, the employer, however, has chosen to provide to the employee liability insurance coverage and provided pursuant to N.C.G.S. § 20-279.21(b)(4) underinsured motorist coverage. The underinsured motorist coverage limits are controlled by N.C.G.S. § 20-279.21(b)(4) and the parties admit that \$75,000 is the applicable amount.

There is no statutory provision allowing, nor does *Smith* permit, an additional reduction in the amount of underinsured coverage by deducting workers' compensation benefits paid to the employee.

The employer can choose not to furnish liability insurance for an employee provided there is workers' compensation coverage. N.C.G.S. § 20-279.21(e) (1983). However, once the choice is made to provide coverage, and underinsured coverage limits are not stated in the policy, the limit on underinsured coverage to be paid is determined by the statute.

As discussed in *Smith*, the Financial Responsibility Act's (Chapter 20, Article 9A of the North Carolina General Statutes) primary purpose is "to compensate innocent victims who have been injured by financially irresponsible motorists. . . . Furthermore, the Act is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *South Carolina Ins. Co. v. Smith*, 67 N.C. App. at 636, 313 S.E. 2d at 860 (citation omitted). See also *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 338 S.E. 2d 92 (1986). The interpretation advocated by Farm Bureau clearly does not comport with this purpose. If such was the law, then Farm Bureau could totally avoid any underinsured coverage if the amount of workers' compensation benefits paid were greater than the stated limits in the policy. Such is not the law, however.

Pursuant to N.C.G.S. § 97-10.2(j), the employer's insurance company can be subrogated for the amount of workers' compensation paid by it to the employee. In the case *sub judice* Farm Bureau has received \$25,000 via a previous settlement and can collect the balance as provided by statute.

The trial court's decision is affirmed.

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Affirmed.

Judges ARNOLD and GREENE concur.

ELLA J. SHOFFNER v. ODELL C. SHOFFNER

No. 8718DC1199

(Filed 20 September 1988)

1. Divorce and Alimony § 30—equitable distribution—expenses incurred because of failure of one spouse to cooperate—consideration proper in making award

Failure to comply with discovery orders or misconduct during the course of litigation may not be considered as a factor in determining the distribution of marital property; however, when the failure to assist in the compilation and valuation of marital property during litigation causes one party to incur additional expenses, the court may consider such a purely financial consideration in making its distributive award.

2. Divorce and Alimony § 30—equitable distribution—pensions—seven-day interval between separation and valuation of pensions

Though it is true that an equitable distribution award should be based upon a vested accrued benefit which is calculated as of the parties' separation date, defendant failed to demonstrate that either of the parties made any additional contributions or that any additional interest had accrued to the parties' pensions during the seven-day interval between the parties' date of separation and the date of valuation. N.C.G.S. § 50-20(b)(3)(d).

3. Divorce and Alimony § 30—equitable distribution order—modification of child support order—time for entry of each

Modification, upon request, of a child support order concerning the depository at which payments may be made does not come within the rule that an equitable distribution order must be entered prior to alimony or child support awards, or modification of those already in existence; therefore, the request in this case could be granted or denied within the court's discretion and at the time of its choosing.

APPEAL by defendant from *Daisy, Judge*. Order entered 27 May 1987 in District Court, GUILFORD County. Heard in the Court of Appeals 10 May 1988.

Rivenbark, Kirkman, Alspaugh & Moore, by Douglas E. Moore, P.A., for plaintiff-appellee.

Barbee, Johnson & Glenn, by Walter T. Johnson, Jr., for defendant-appellant.

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JOHNSON, Judge.

Plaintiff and defendant were married on 7 November 1959. There were three children born of this union: Karen P. Shoffner, born 15 March 1961, Odell C. Shoffner, Jr., born 23 June 1965, and Yvonne P. Shoffner, born 3 August 1971. Yvonne Shoffner is the couple's only minor child.

On 28 December 1984, plaintiff filed a complaint numbered 84-CVD-8057 seeking divorce from bed and board, alimony pendente lite, counsel fees, child custody, child support, permanent alimony and equitable distribution.

When the matter came on for hearing on 18 February 1985, the court determined: that neither party was a "dependent spouse" as defined in G.S. sec. 50-16.1(3); that neither party was the supporting spouse as defined in G.S. sec. 50-16.1(4); that plaintiff was therefore not entitled to an award of alimony pendente lite; that defendant was entitled to the exclusive use and possession of the marital home with the responsibility of paying the two outstanding mortgages and the taxes and insurance thereupon; and that plaintiff should be responsible for the support of the minor child while the minor child lived with plaintiff, and that defendant should be responsible for the minor child's support while she lived with him.

On 6 March 1986, plaintiff filed a complaint seeking an absolute divorce from defendant on the grounds of a one-year separation, as well as equitable distribution of their assets. Plaintiff also filed a motion on 6 June 1986 to modify the custody and support order which was entered on 18 February 1985. Pursuant to this motion, the parties entered a consent order in open court on 3 July 1986. The order provided that plaintiff should have primary custody of the minor child, and that defendant should have secondary custody of the minor child, along with the obligation to pay \$50.00 per week for child support.

The parties were granted an absolute divorce on 23 June 1986, and the pending claim for equitable distribution was continued. On 2 December 1986, the matter of equitable distribution was heard. Another hearing on this matter was scheduled for 3 February 1987. The court ordered that the items listed in the equitable distribution order under the column designated "plain-

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tiff's" should be her separate property, and the items designated "defendant's" should be his separate property. The court further ordered that any outstanding loans on separate property should be paid by the party to whom the property was distributed. The parties were also assigned specific loans to pay. Defendant was ordered to pay to plaintiff \$33,651.08 on or before 1 July 1987, to equitably distribute the marital estate. A provision was also entered regarding the procedure to follow in the event defendant failed to pay that amount on or before the specified date. From this order of equitable distribution, defendant appeals.

Defendant presents six questions for review. We find that only three of those merit discussion; namely, questions one, two and six. Insofar as questions three, four and five are concerned, they are overruled.

[1] In Assignment of Error number one, defendant contends that the trial court erred when it based an unequal distribution of property on his alleged failure to cooperate with the court during the course of litigation. We find no error.

In finding of fact number nineteen, the court stated the following:

The Court has considered other factors and the testimony of Plaintiff as to her contentions why an equitable distribution justifies that she receive more than fifty percent (50%) of the marital estate as her sole and separate property. Defendant failed to fully cooperate and participate with Plaintiff and this Court in the formation of a pre-trial order. *This failure required Plaintiff to incur additional attorney's fees from her separate property for the preparation of the necessary information for this Court's consideration of both parties' Motion[s] of equitable distribution. This Court finds that it would be inequitable to allow Defendant to benefit from this expense incurred by Plaintiff.*

This finding of fact clearly illustrates that the court did not make an unequal distribution as a punishment for defendant's failure to cooperate in compiling a list of marital property for the pre-trial order. We agree with defendant that failure to comply with discovery orders, or misconducting oneself during the course of litigation may not be considered as a factor in determining the

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distribution of marital property. *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1985). However, when the failure to assist in the compilation and valuation of marital property during litigation causes one party to incur additional expenses, the court may consider such a purely financial consideration in making its distributive award. We find this equivalent to the proper consideration of marital misconduct which is related to the economic condition of the marriage as a factor in making the distributive award. See *Spence v. Jones*, 83 N.C. App. 8, 348 S.E. 2d 819 (1986).

G.S. sec. 50-20(c) mandates an equal division of marital property unless the court determines that such a division is inequitable. If the court determines that an equal division would be inequitable, it shall then make an equitable division based upon several factors, such as the income, property, and liabilities of each party which exist when the property division is to become effective; G.S. sec. 50-20(c)(1); "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution"; G.S. sec. 50-20(c)(11a); and any other factor which the court may find to be just and proper. G.S. sec. 50-20(c)(12).

This Court has held that a finding, with evidentiary support, that a single factor is sufficient to support an unequal distribution, is within the court's discretion and is properly upheld on appeal. *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E. 2d 809, *disc. rev. denied*, 316 N.C. 730, 345 S.E. 2d 385 (1986). We are met with findings which are amply supported by the evidence, and a proper exercise of discretion by the trial court. This assignment of error is overruled.

[2] By Assignment of Error number two, defendant contends that the trial court erred when it based its distribution of the marital property on evidence of values of the marital property assigned after the date of the parties' separation. Again, we find no error.

Defendant specifically alleges that although plaintiff and defendant were separated on 24 December 1984, the court valued the parties' pensions as of 31 December 1984. He argues that G.S. sec. 50-20(b)(3)(d) provides that the award should be based upon a vested accrued benefit which is calculated as of the parties' sepa-

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ration date, not to include any compensation or contributions which accrue after the separation date. While this is a correct statement, defendant has failed to demonstrate that either of the parties made any additional contributions, or that any additional interest had accrued to the retirement plans during the seven-day interval between the parties' date of separation and the date of valuation. Therefore, this assignment of error is overruled.

[3] In Assignment of Error number six, defendant argues that the trial court erred when it modified an existing custody and support order without a showing of changed circumstances, nor a consideration of its order on equitable distribution. We do not agree.

On 3 July 1986, the defendant, by consent order, agreed to pay \$50.00 per week for support of the minor child, and also agreed that plaintiff should have the primary support of the minor child. He testified on 2 December 1986 that he had fully complied with the oral consent order concerning child custody and support.

In its order of equitable distribution entered 27 May 1987, the court modified the previous custody and support order in one manner only, to provide that the defendant pay the amount of child support through the office of the clerk of court rather than to the plaintiff directly. Defendant argues that the modification was entered as a part of the equitable distribution order, and not therefore after equitable distribution, as is required. See *Capps v. Capps*, 69 N.C. App. 755, 318 S.E. 2d 346 (1984).

It is clear to us that the requirement regarding the sequence, equitable distribution order to be entered prior to alimony or child support awards, or modification of those already in existence, is designed to accommodate "the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it." *Capps* at 757, 318 S.E. 2d at 348. A modification, upon request, concerning the depository at which the payment may be made has no relationship to this requirement. The request could therefore be granted or denied within the court's discretion, and at the time of its choosing. Therefore, this assignment of error is also overruled, and for the foregoing reasons, the judgment is

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Affirmed.

Judges PHILLIPS and SMITH concur.

OTTO C. MEADOWS AND WIFE, EVA N. MEADOWS v. CIGAR SUPPLY COMPANY, INC. AND CARGOCARE TRANSPORTATION COMPANY, INC.

No. 8811SC260

(Filed 20 September 1988)

Automobiles § 50.3 – parking truck in lane of travel – sufficiency of evidence of breach of duty – hitting truck not contributory negligence as matter of law

In an action to recover for injuries sustained in an automobile accident, issues as to whether defendant breached a duty owed to plaintiff and whether plaintiff was contributorily negligent should have been determined by a jury where the evidence tended to show that defendant parked one of its flatbed trucks in the eastbound lane of travel with its flashers on to warn motorists that another truck was protruding into the lane of travel while its back was in the loading bay area of defendant's warehouse; motorists in the eastbound lane of travel at the time of the accident were blinded by the sun; immediately prior to the accident in question a police officer, wearing sunglasses, using his visor, and looking through the tinted glass of his patrol car, did not see defendant's truck with its flashers working; and plaintiff struck the back of defendant's truck without ever having seen it.

APPEAL by plaintiffs from *Johnson (E. Lynn), Judge*. Order entered 9 November 1987 in Superior Court, LEE County. Heard in the Court of Appeals 1 September 1988.

Plaintiffs seek to recover for personal injuries and property damage suffered by Mr. Meadows and loss of consortium by Mrs. Meadows when Mr. Meadows was involved in an automobile accident allegedly caused by the actionable negligence of defendants. Plaintiffs gave notice of dismissal without prejudice as to Cargocare Transportation Company, Inc. (Cargocare), and Cargocare is not a party to this appeal. An order was entered granting summary judgment for Cigar Supply Company, Inc. (Cigar Supply). Plaintiffs appeal.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiffs-appellants.

Donald J. McFadyen for defendant-appellee.

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SMITH, Judge.

Plaintiffs' sole assignment of error is directed at the trial court's granting of defendant's motion for summary judgment. Plaintiffs contend the trial court erred in granting defendant's motion in that the issues of whether defendant breached a duty owed to Mr. Meadows and whether Mr. Meadows was contributorily negligent should be determined by a jury. We agree.

The affidavits and depositions disclose that on 6 January 1986, between 7:00 and 8:00 a.m., a Cargocare truck was backed into a loading bay area of a warehouse with the truck cab protruding into the outside eastbound travel lane of Third Street in Sanford, North Carolina. A Cigar Supply flatbed truck was also parked adjacent to the curb in the outside eastbound lane north of the Cargocare cab. Cigar Supply's employee activated four-way flashers on its truck to warn approaching motorists of the Cargo-care truck.

Just before 8:00 a.m., Officer Billy Norris of the Sanford Police Department was driving east in the inside lane on Third Street near the Cigar Supply warehouse. Although he was wearing sunglasses, using his car's sun visor, and looking through the tinted glass of his patrol car, it was extremely difficult for him to see because of the rising sun's glare. Norris did not see the Cigar Supply Truck parked in the outside lane until he was directly beside it and would have struck it had he been in the outside lane. He immediately drove around the block to return to the warehouse and have the truck moved or have other measures taken to warn approaching traffic.

Mr. Meadows testified in his deposition that while Officer Norris was circling the block, Mr. Meadows was driving his van east in the outside lane of Third Street. The sun's glare impaired his vision, so he took his foot off the accelerator but continued to drive ahead. He did not apply his brakes or stop his vehicle. Mr. Meadows did not see the Cigar Supply truck before he hit the back of it.

By deposition, Cigar Supply's manager on duty on 6 January 1986 testified that on numerous occasions before the accident he had ordered employees to park a truck on the street with its flashers on to warn motorists of trucks protruding from the

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loading dock into the outside lane of Third Street. However, other Cigar Supply employees testified that 6 January 1986 was the first time they remembered a truck being parked on the street to warn approaching motorists. Defendant also submitted the affidavit of Robert J. Bracken, a licensed surveyor and registered engineer, to the effect that a driver travelling the same path as Mr. Meadows would have had an unobstructed view of the parked truck at least 520 feet from the location of the accident.

The trial court's judgment is correct "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that [defendant] is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). "Summary judgment may not be granted if there is any genuine issue as to any material fact." *Gray v. American Express Co.*, 34 N.C. App. 714, 715, 239 S.E. 2d 621, 623 (1977). In ruling on defendant's motion for summary judgment, the court must consider any evidence in the light most favorable to plaintiffs, *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E. 2d 39 (1986), and give to plaintiffs all favorable inferences which may reasonably be drawn from the evidence. *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974).

In a negligence action, summary judgment for defendant is proper if the evidence establishes as a matter of law no negligence on the part of defendant or contributory negligence by plaintiff. *Stansfield v. Mahowsky*, 46 N.C. App. 829, 266 S.E. 2d 28, *disc. rev. denied*, 301 N.C. 96 (1980). Plaintiffs claim, *inter alia*, that defendant was negligent by (1) parking and leaving standing its truck upon a paved and main travelled portion of a North Carolina highway in violation of G.S. 20-161(a) and (2) failing to give adequate warning or notice to approaching traffic of the presence of its parked vehicle. G.S. 20-161(a) only applies outside municipal corporate limits and is thus inapplicable to the case at bar. Additionally, plaintiffs have not alleged or shown a violation of any local safety ordinance to support a claim of negligence. Therefore, defendant was negligent only if it did not exercise due care in the existing circumstances and conditions.

In *Coleman v. Burris*, 265 N.C. 404, 144 S.E. 2d 241 (1965), the court found that a defendant has a common law duty to act as a

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reasonably prudent person under similar circumstances to warn approaching traffic, by lights or otherwise, that its truck is blocking the street. This duty exists even in the absence of an ordinance or statute. *Id.* “[W]hether a person has exercised due care, that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances, is ordinarily a question for jury determination.” *Strickland v. Hughes*, 2 N.C. App. 395, 397, 163 S.E. 2d 24, 26 (1968). The record in this case does not support a finding as a matter of law that defendant did not breach its duty. The issue of whether defendant breached its duty to Mr. Meadows is one to be determined by the jury and not by the court.

The trial court’s judgment was likewise error as the record does not support a finding of contributory negligence as a matter of law.

The question of whether a motorist is contributorily negligent as a matter of law by proceeding when his or her vision becomes obscured by conditions on the highway has been addressed by our appellate courts on several occasions, with mixed results. See *White v. Mote*, 270 N.C. 544, 155 S.E. 2d 75 (1967) (motorist proceeded into fog created by insecticide fogging machine and collided with rear of the fogging truck; held not contributorily negligent as a matter of law); *Bradham v. McLean Trucking Co.*, 243 N.C. 708, 91 S.E. 2d 891 (1956) (motorist proceeding in fog created by health department truck spraying DDT, turned in front of oncoming tractor-trailer; held contributorily negligent as a matter of law); *Dawson v. Seashore Transportation Co., Inc.*, 230 N.C. 36, 51 S.E. 2d 921 (1949) (motorist proceeding into dense fog and smoke, reduced speed and struck defendant’s unlighted bus; held not contributorily negligent as a matter of law); *Riggs v. Gulf Oil Corp.*, 228 N.C. 774, 47 S.E. 2d 254 (1948) (motorist proceeding in dark and fog at 25 miles per hour struck unlighted truck parked on highway; held contributorily negligent as a matter of law); *Sibbitt v. R. & W. Transit Co.*, 220 N.C. 702, 18 S.E. 2d 203 (1942) (motorist proceeded through blankets of smoke on highway at night, struck unlighted truck on highway; held contributorily negligent as a matter of law); *Clark v. Moore*, 65 N.C. App. 609, 309 S.E. 2d 579 (1983) (motorist blinded by sun struck truck which had

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been abandoned on highway; held not contributorily negligent as a matter of law); *Doggett v. Welborn*, 18 N.C. App. 105, 196 S.E. 2d 36, cert. denied, 283 N.C. 665, 197 S.E. 2d 873 (1973) (motorist proceeded into "smoke bank" at reduced speed and struck vehicle which she knew had preceded her into the smoke; held contributorily negligent as a matter of law). It is apparent from these varied decisions that there is no absolute universal rule which may be applied; the conduct of each motorist must be evaluated in the light of the unique factors and circumstances with which he or she is confronted. Only in the clearest cases should a failure to stop completely be held to be negligence as a matter of law.

Allen v. Pullen, 82 N.C. App. 61, 67-68, 345 S.E. 2d 469, 473-74 (1986), disc. rev. denied, 318 N.C. 691, 351 S.E. 2d 738 (1987). In *Clark v. Moore*, *supra*, plaintiff's car struck the corporate defendant's truck which had been abandoned in plaintiff's lane of travel. The evidence showed that plaintiff approached the truck driving 15 to 25 miles per hour below the posted speed limit around 7:00 a.m. with the sun blinding his vision for about 800 feet before the point of impact. This court held that while a jury could conclude that plaintiff was contributorily negligent by continuing to drive with the blinding sun in his face, it could also "infer that plaintiff was exercising the ordinary care required of a reasonably prudent person who finds himself driving with blinding sunlight in his face." *Id.* at 611, 309 S.E. 2d at 581.

Considering the evidence in the light most favorable to plaintiffs and giving them the benefit of all reasonable inferences, the record in this case does not support a finding that Mr. Meadows was contributorily negligent as a matter of law. Further, there are genuine issues of material fact in the affidavits of Officer Norris, the Cigar Supply employees and the surveyor as to whether vision on Third Street was obstructed by the sunlight. Inconsistencies in the evidence are not to be resolved on a motion for summary judgment; "it is for the jury to determine the weight and credit to be given the testimony, and to resolve the inconsistencies." *Strickland*, 2 N.C. App. at 398, 163 S.E. 2d at 26.

We hold that the evidence, when considered in the light most favorable to plaintiffs, does not show defendant's lack of

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negligence or Mr. Meadows' contributory negligence as a matter of law. These are questions for the jury.

Reversed and remanded.

Judges EAGLES and ORR concur.

MARY LITTLE GARRETT v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, BY AND THROUGH ITS BOARD OF TRUSTEES

No. 875SC1253

(Filed 20 September 1988)

Retirement Systems § 5— death occurring more than 90 days after last day of actual service—what constitutes last day of actual service

A state employee's last day of service occurred on 18 July 1981, the date his sick and annual leave expired, rather than on 25 February 1982, the day his position was vacated; therefore, plaintiff beneficiary was not entitled to the statutory death benefit provided under N.C.G.S. § 135-5(1) because the employee's death on 1 March 1982 occurred more than ninety days after his last day of actual service, and he was thus not "in service" at the time of his death.

Judge BECTON concurring in the result.

APPEAL by respondent Teachers' and State Employees' Retirement System from *Barefoot, Judge*. Judgment entered 5 October 1987 in PENDER County Superior Court. Heard in the Court of Appeals 29 August 1988.

This appeal arises from a judgment awarding petitioner the statutory death benefit provided under N.C. Gen. Stat. § 135-5(1) (1979). Charles D. Garrett enrolled in the Teachers' and State Employees' Retirement System (hereinafter "the System") on 26 July 1979, and began working as a prison guard for the North Carolina Department of Correction on 14 August 1979. On 6 June 1981 he had a seizure while on duty in the guard tower at the Pender Prison Unit, and was hospitalized. He remained in the hospital until his death, 268 days later, on 1 March 1982.

Mr. Garrett was placed on leave without pay on 18 July 1981, when he exhausted all accumulated annual and sick leave. He

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received a favorable performance evaluation from his supervisor on 14 August 1981, but was notified on 23 February 1982 that his position had been vacated. He was also told that his state salary continuation payments would not be affected and that accommodations for him would be made if he were able to return to duty. The trial court found that he had not been terminated from his employment.

Mr. Garrett's employee handbook described the death benefit as follows:

After one year of employment, members of the Teachers' and State Employees' Retirement System automatically are eligible for a death benefit. It is free, but cannot be transferred if you should leave State service.

The beneficiary is paid an amount equal to the employee's salary earned in the year before death. This is paid in a lump sum, not over \$20,000.00.

His widow, as designated beneficiary, applied for the benefit but the System ruled her ineligible. Finding that petitioner's last day of actual service occurred more than ninety days before his death, the System determined that he was precluded from recovering the death benefit under N.C. Gen. Stat. § 135-5(1) (1979). Petitioner appealed to the System's Board of Trustees, which affirmed the ruling. On appeal from the final agency decision the trial court reversed and ordered that the petitioner recover the statutory death benefit in the amount of \$11,377.70.

Moore & Lee, by Mary E. Lee, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Norma S. Harrell, for respondent-appellant.

WELLS, Judge.

Respondent raises several assignments of error concerning the standard of review under the North Carolina Administrative Procedure Act, N.C. Gen. Stat. §§ 150B-1-64 (1987), but we do not deem it necessary to reach them on this appeal.

This case involves the interpretation of the "in service" provisions of N.C. Gen. Stat. § 135-5(1) (1979) (current version N.C.

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Gen. Stat. § 135-5(1) (1987)). The relevant portions of the death benefit provisions of the statute are as follows:

Upon receipt of proof, satisfactory to the Board of Trustees in their capacity as trustees under the Group Life Insurance Plan, of the death, in service, of a member who had completed at least one full calendar year of membership in the Retirement System, there shall be paid to such person as he shall have nominated . . . , a death benefit.

. . .

For the purposes of this Plan, a member shall be deemed to be in service at the date of his death if his last day of actual service occurred not more than 90 days before the date of his death

In administration of the death benefit the following shall apply:

. . .

(2) Last day of actual service shall be:

- a. When employment has been terminated, the last day the member actually worked.
- b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire, unless he is on approved leave of absence and is in service under the provisions of G.S. 135-4(h).

(3) For a period when a member is on leave of absence, his status with respect to the death benefit will be determined by the provisions of G.S. 135-4(h).

In *Stanley v. Retirement and Health Benefits Division*, 55 N.C. App. 588, 286 S.E. 2d 643, petition for review denied, 305 N.C. 587, 292 S.E. 2d 571 (1982), relied upon by petitioner, this Court reversed the denial of the death benefit to a teacher's widower, holding that the teacher was "in service" when she died. Mrs. Stanley had taught until 7 June 1974, but applied for a year's leave of absence due to illness. Her health subsequently improved and on 26 June 1974 she was assigned to begin teaching again the following September. Her condition declined during the summer and she resigned the new position on 12 August 1974.

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She died on 9 October 1974. The System denied her widower's request for the death benefit, finding that more than ninety days elapsed from the date her leave ran out, 8 June 1974, to the date of her death. This Court disagreed with the System's restrictive interpretation and held that because the leave of absence was terminated on 26 June 1974, she had returned to service after 8 June 1974.

While recognizing the principles involved in *Stanley*, including our interpretation of the "90 day deemed in service" (or 180 days, under the current version of N.C. Gen. Stat. § 135-5(1) (1987)) rule as an inclusionary provision, we hold, however, that the petitioner in the case at bar clearly does not qualify for the statutory death benefit.

The trial court having found that Mr. Garrett's employment had not been terminated, the N.C. Gen. Stat. § 135-5(1)(2)(b) (1979) becomes applicable in this case. This section of the statute provides that Mr. Garrett's last day of service occurred on 18 July 1981, the date his sick and annual leave expired. We disagree with petitioner's argument that his last day of service was the day his position was vacated, 25 February 1982. Mr. Garrett did nothing to indicate a return to actual service after his hospitalization on 6 June 1981. This case cannot be analogized to *Stanley* where the teacher's attempted return to the classroom advanced her last day of actual service.

Mr. Garrett did not contribute to the Retirement System after being placed on leave without pay, so the possible extension provided by § 135-4(h) (1979) for plan members who contribute while on leave of absence does not apply. Because his death occurred more than ninety days after his last day of actual service, Mr. Garrett was not in service at the time of his death and his beneficiary is not eligible for the death benefit.

The trial court emphasized the portion of Mr. Garrett's employee handbook that described the death benefit. Although the handbook description may be sufficiently vague to mislead an employee about its availability, we hold that the handbook provision created no contractual agreement to provide a death benefit. See, e.g., *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E. 2d 357 (1987).

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For reasons stated, the judgment of the trial court must be reversed.

Reversed.

Judge PHILLIPS concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

The Legislature has spoken, and I reluctantly concur in the result.

STATE OF NORTH CAROLINA v. HILTON RUDOLPH WEAVER

No. 8830SC45

(Filed 20 September 1988)

Automobiles § 130.1— impaired driving—punishment—aggravating factor of previous convictions outweighing mitigating factor of five years clean driving

In the sentencing phase of defendant's trial for unlawfully and willfully operating a motor vehicle while subject to an impairing substance in violation of N.C.G.S. § 20-138.1, the trial judge acted well within his discretion in finding that the aggravating factor of three prior convictions of impaired driving, though more than seven years before, substantially outweighed the mitigating factor of a clean driving record for more than five years prior to the present conviction. N.C.G.S. § 20-179(f).

APPEAL by defendant from *Downs, James U., Judge*. Judgment entered 20 August 1987 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 31 May 1988.

Attorney General Lacy H. Thornburg, by Associate Attorney General H. Julian Philpott, Jr., for the State.

Alley, Hyler, Killian, Kersten, Davis & Smathers, by Patrick U. Smathers and Robert J. Lopez, for defendant-appellant.

JOHNSON, Judge.

Defendant's appeal is limited solely to the sentencing phase of his trial in which he was tried for unlawfully and willfully oper-

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ating a motor vehicle while subject to an impairing substance in violation of G.S. sec. 20-138.1.

On 7 February 1987, defendant was charged with the violation hereinabove stated. He was tried before a jury on 20 August 1987 in Superior Court, Haywood County and was found guilty as charged.

During the sentencing phase of the trial, evidence was considered to the effect that defendant had been previously convicted on 27 June 1973 for driving while impaired, on 10 December 1976 for driving while impaired, and on 13 December 1976, also for driving while impaired. The evidence also showed that defendant had been convicted for speeding 75 mph in a 60 mph zone, for speeding 65 mph in a 55 mph zone, for driving on the wrong side of the road, and for speeding 68 mph in a 55 mph zone. These named convictions occurred between 27 June 1973 and 8 August 1980.

The trial court determined that an aggravating factor existed pursuant to G.S. sec. 20-179(d)(5) in that defendant had at least one prior conviction for driving while impaired which occurred more than seven years before the date of the present offense. The court found as a mitigating factor that defendant had a safe driving record, having had no convictions of any serious motor vehicle offenses for which at least four points are assigned under G.S. sec. 20-16(c), or for which defendant's license was subject to revocation, within five years of the date of the present offense, as specified in G.S. sec. 20-179(e)(4).

After having determined that the aggravating factor substantially outweighed the mitigating factor, the trial court imposed a level three punishment. Defendant was sentenced to six months imprisonment, suspended for a period of two years, on condition that he be placed on unsupervised probation for two years and that he serve thirty days in the Haywood County jail. From this sentence, defendant appeals.

On appeal, defendant contends that the trial court erred by imposing level three punishment when under the present facts, the aggravating factor did not substantially outweigh the mitigating factor. We do not agree. The substance of defendant's argument is that it was not the legislature's intent to vest the trial

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court judge with the same broad discretionary powers in making the first step determination, concerning the selection of the level of punishment to impose in impaired driving cases, as that afforded trial court judges in the actual sentencing scheme under the Fair Sentencing Act. Defendant's argument is limited to the first step of the sentencing process, as he does not disagree with the discretionary powers which the trial judge possesses in selecting the actual punishment within the maximum and minimum levels prescribed pursuant to G.S. secs. 20-179(g)-(l).

G.S. sec. 20-179(a) states in pertinent part that "[a]fter a conviction for impaired driving under G.S. sec. 20-138.1, the judge must hold a sentencing hearing to determine whether there are aggravating or mitigating factors that affect the sentence to be imposed."

G.S. sec. 20-179(f) states in pertinent part that:

If the judge in the sentencing hearing determines that there are no grossly aggravating factors, he must weigh all aggravating and mitigating factors listed in subsections (d) and (e). If the judge determines that:

(1) The aggravating factors substantially outweigh any mitigating factors, he must note in the judgment the factors found and his finding that the defendant is subject to the Level Three punishment and impose a punishment within the limits defined in subsection (i).

In the case *sub judice*, the trial judge found as factors to be considered in sentencing: (a) that no grossly aggravating factors were present; (b) that as an aggravating factor, defendant had at least one prior conviction of an impaired driving offense which occurred over seven years before the date of the present offense charged; and (c) as a factor in mitigation, that defendant has a safe driving record, having no convictions of any serious motor vehicle offense for which at least four points are assessed, or for which defendant's license was subject to revocation, within five years of the date of the present offense. He then imposed a level three punishment as provided in G.S. sec. 20-179(i).

We have no difficulty in assessing the legislature's intent with respect to the level of discretion granted a trial judge in sentencing those convicted of impaired driving offenses. The

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statutes governing sentencing are quite systematic and tiered, thus leaving little room to exercise discretion. In fact, as defendant aptly notes, the process resembles "pigeonholing" as the statutes supply the trial judge with the step-by-step formula; i.e., to review the evidence, to determine whether the evidence supports the factors listed in gross aggravation, aggravation, or mitigation, to weigh the factors supported by the evidence, and to determine the level of punishment. We agree with the State's contention that the sentencing scheme under our consideration is not nearly as "arbitrary or capricious" as defendant suggests.

Defendant further argues that a trial judge should be required to follow a strict mathematical formula in order to determine whether the aggravating factors *substantially* outweigh the mitigating factors. Under this scheme, the trial judge would, under most circumstances, be allowed to find that the aggravating factors had *substantially* outweighed the mitigating factors, and vice versa, only if there were a greater number of the factors in question. Although this proposal is riddled with shortcomings, the most glaring error is the oversight of a situation where, as in the case *sub judice*, the number of aggravating and mitigating factors are equal.

We are comfortable with the present sentencing scheme and find the language of the statutes which govern it, with regard to the discretion granted to the trial judge, reasonably discernible. Where it is unclear, we look to the Fair Sentencing Act, G.S. sec. 15A-1340.4 (1983), cases decided thereunder, and to the plain meanings of the terms within the statutes for assistance. *State v. Mack*, 81 N.C. App. 578, 345 S.E. 2d 223 (1986).

It has been held that the balancing of factors in aggravation and mitigation lies within the sound discretion of the sentencing judge, *State v. Goforth*, 59 N.C. App. 504, 297 S.E. 2d 128 (1982), and that the results of the balancing reached by the trial judge will not be disturbed on appeal if record evidence supports the determination. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982).

The plain meaning of the term "substantially" may be found in Black's Law Dictionary 1281 (5th ed. 1979), which defines it as, "[e]ssentially; without material qualification; in the main; in

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substance; materially; in a substantial manner. About, actually, competently, and essentially." (Citation omitted.)

With this guidance in mind, we are satisfied in holding that the trial judge acted well within his discretion in finding that under the present facts, the aggravating factor substantially outweighed the mitigating factor. Defendant's three prior convictions of impaired driving, though more than seven years before, were considered to substantially outweigh the fact that he had received no traffic convictions for a period of more than five years prior to the present conviction. We find no abuse of discretion based upon this determination and the level three punishment imposed.

Therefore, we affirm the judgment in all respects.

Affirmed.

Judges PARKER and COZORT concur.

WACHOVIA BANK AND TRUST CO., N.A. v. SOUTHEAST AIRMOTIVE, INC.

No. 8826SC112

(Filed 20 September 1988)

Negligence § 29; Appeal and Error § 24— damages in plane crash—no directed verdict or judgment n.o.v.—necessity for exceptions—no questions presented for review

In an action to recover damages for the alleged negligence of defendant in the transportation of certain cancelled checks which were burned, mutilated, or destroyed in a plane crash, plaintiff was not entitled to a directed verdict or to judgment n.o.v. where plaintiff's evidence did not compel a finding that defendant was negligent; defendant denied that it was negligent and denied that its actions were the proximate cause of plaintiff's alleged damages; and defendant introduced evidence that its pilot could have suffered a sudden physical incapacitation which caused the crash, and this raised a genuine issue of fact for the jury. Furthermore, a number of plaintiff's assignments of error were not supported by exceptions duly noted in the record or transcript, and they thus presented no question for review.

APPEAL by plaintiff from *Gray, Judge*. Judgment entered 31 July 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 September 1988.

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This is a civil action wherein plaintiff seeks to recover damages for the alleged negligence of defendant in the transportation of certain cancelled checks which were burned, mutilated, or destroyed in a plane crash on 15 November 1983. The jury returned a verdict in favor of defendant, and the court entered judgment on the verdict on 31 July 1987. On 25 August 1987, the court entered an order denying plaintiff's motion for judgment notwithstanding the verdict or a new trial. Plaintiff appealed.

Womble Carlyle Sandridge & Rice, by Donald F. Lively, and R. Howard Grubbs, for plaintiff, appellant.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Irvin W. Hankins, III, and Stephen R. Hunting, for defendant, appellee.

HEDRICK, Chief Judge.

By Assignments of Error Nos. 1 and 2 plaintiff contends the trial court erred in allowing defendant's expert witness, Dr. Hobart R. Wood, to testify over plaintiff's objections concerning "his opinion as to whether or not the pilot of the airplane suffered an incapacitating heart attack while approaching to land" and concerning "the condition of the pilot's heart."

These assignments of error are not supported by exceptions duly noted in the record or transcript as required by Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. Thus, these assignments of error present no question for review.

By Assignments of Error Nos. 6 and 7 plaintiff contends the trial court erred in denying plaintiff's motion for a directed verdict at the close of all the evidence and in denying plaintiff's motion for judgment notwithstanding the verdict and motion for a new trial.

The Supreme Court, in *Rose v. Motor Sales*, 288 N.C. 53, 61-62, 215 S.E. 2d 573, 578 (1975), stated:

The trial judge may not direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses, even though the evidence is uncontradicted, the defendant's denial of an alleged fact, necessary to the plaintiff's right of recovery, being sufficient to raise an issue as to the existence of that fact, even

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though he offers no evidence tending to contradict that offered by the plaintiff.

In the present case, plaintiff offered evidence sufficient to support an inference that defendant was negligent. However, plaintiff's evidence did not compel such a finding, and the credibility of plaintiff's evidence was for the jury. Also, defendant denied that it was negligent and denied that its actions were the proximate cause of plaintiff's alleged damages. Defendant further introduced evidence that defendant's pilot could have suffered a sudden physical incapacitation that caused the crash. "The established policy of this State—declared in both the constitution and statutes—is that the credibility of testimony is for the jury, not the court, and that a genuine issue of fact must be tried by a jury unless this right is waived." *Cutts v. Casey*, 278 N.C. 390, 421, 180 S.E. 2d 297, 314 (1971). The trial court did not err in denying plaintiff's motion for a directed verdict.

"The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as that of a motion for a directed verdict. . . ." *Dickinson v. Pake*, 284 N.C. 576, 584, 201 S.E. 2d 897, 903 (1974). We cannot say that, considering the evidence in the light most favorable to defendant, plaintiff was entitled to a judgment notwithstanding the verdict. Since plaintiff failed to discuss in its brief the trial court's denial of its motion for a new trial, this question raised by Assignment of Error No. 7 is deemed abandoned. See Rule 28(a) of the North Carolina Rules of Appellate Procedure. Assignments of Error Nos. 6 and 7 are without merit.

Plaintiff next contends "the trial court committed reversible error when it excluded plaintiff's expert pilot's opinion that, based on a reasonable certainty, the pilot of defendant's aircraft did not exercise reasonable care and was not incapacitated during the approach to land but allowed defendant's lay witnesses to express speculative opinions on a variety of topics." This argument is based on Assignments of Error Nos. 3, 4 and 5 which are set out in the record as follows:

3. The trial court erred in not allowing plaintiff's expert witness, Velta S. Benn, to testify as to her opinion that the pilot had not suffered any physical incapacitation, while allowing defendant's witnesses Gary Barrier, and Gene Love

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to testify as to their opinion that the pilot had suffered some form of incapacitation.

4. The trial court erred in not allowing plaintiff's expert, Velta S. Benn, to testify regarding her opinion as to whether or not the pilot had exercised reasonable care in the operation of the airplane.

5. The trial court erred in permitting defendant's witness, Wendell Karr, to testify over plaintiff's objections regarding an incident that occurred in which he passed out while piloting an airplane during the early 1950's.

Assignment of Error No. 3 is in violation of Rule 10(c) of the North Carolina Rules of Appellate Procedure which states that each assignment of error "shall state plainly and concisely and without argumentation the basis upon which error is assigned. . . ." This assignment of error is argumentative and not concisely stated. More importantly, all three of these assignments of error are not supported by exceptions duly noted in the record or transcript and thus present no question for review. See Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure.

By Assignments of Error Nos. 1-5 plaintiff contends "the trial judge's incorrect evidentiary rulings constituted reversible error because they seriously prejudiced the jury's ability objectively to evaluate the evidence." These assignments of error are not supported by exceptions duly noted in the record or transcript as required by Rule 10(b)(1). Also, these assignments of error merely repeat what plaintiff has argued in its earlier contentions. Therefore, they present no question for review and are without merit.

The judgments of a trial court are presumed to be correct, and the burden is on the appellant to rebut the presumption of verity. The Rules of Appellate Procedure, if followed, provide an appealing party a means by which it can properly attack judgments, orders, and rulings of a trial court in order to show prejudicial error. If the appealing party fails to properly utilize the Rules of Appellate Procedure, the presumption of verity will not be overcome, and the appellate courts will not search the record or the transcript in order to reverse the judgments, orders and rulings of a trial court having proper jurisdiction.

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In light of our disposition of plaintiff's appeal, it is unnecessary for us to discuss defendant's cross-assignment of error to the court's denial of defendant's motion for a directed verdict on plaintiff's claim for consequential damages at the close of all of the evidence.

No error.

Judges ARNOLD and WELLS concur.

JAMES HENRY NEWTON, SR., ADMINISTRATOR OF THE ESTATE OF JONATHAN LEGRANDE NEWTON, PLAINTIFF v. THE OHIO CASUALTY INSURANCE COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. HARTFORD ACCIDENT AND INDEMNITY COMPANY, THIRD-PARTY DEFENDANT

No. 8820SC253

(Filed 20 September 1988)

Declaratory Judgment Act § 4.3— automobile liability insurance—two insurers—maximum liability of each—no justiciable controversy

Plaintiff could not seek a declaratory judgment to determine the maximum liability owed by defendant insurers to plaintiff under their respective automobile liability policies prior to a jury trial on the merits of plaintiff's claim against the insurers, since there was no justiciable controversy; moreover, all of the issues between all of the parties had not been decided, and the appeal was therefore interlocutory and subject to dismissal.

APPEAL by plaintiff from *Davis (James C.), Judge*. Judgment entered 30 November 1987 in Superior Court, RICHMOND County. Heard in the Court of Appeals 1 September 1988.

Plaintiff brought these actions to recover under the underinsurance provisions of two separate automobile liability policies. Jonathan Newton, plaintiff's intestate, died in a single car accident on 20 April 1985 while riding as a passenger in a non-owned vehicle driven by Hogan Larry Spencer. Spencer's insurer paid plaintiff the limits of its liability, \$25,000, for the death of his intestate.

Plaintiff then instituted two separate suits against his insurers, The Ohio Casualty Insurance Co. (Ohio Casualty), 86-CVS-

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480, and Hartford Accident and Indemnity Company (Hartford), 86-CVS-479. Each insurer answered and alleged specific defenses to plaintiff's claims. In 86-CVS-480 Ohio Casualty named Hartford as a third-party defendant claiming that in the event that it was found liable Hartford should contribute one-half of any award.

Ohio Casualty and Hartford both moved for partial summary judgment on the issue of the maximum liability each company might owe plaintiff. The trial court granted partial summary judgment in favor of Ohio Casualty and Hartford ordering that any recovery from defendants be limited to a maximum of \$12,500 from each insurer. Plaintiff appealed. The trial court stayed the proceedings in 86-CVS-479 against Hartford pending plaintiff's appeal. The parties want the insurers' respective liability established by declaratory judgment prior to a jury trial on the merits of plaintiff's claim.

Dawkins & Nichols, by Donald M. Dawkins, for plaintiff-appellant.

Etheridge, Moser and Garner, by Kenneth S. Etheridge and Jerry L. Bruner, for defendant-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by D. James Jones, Jr. and Theodore B. Smyth, for third-party defendant-appellee.

EAGLES, Judge.

Plaintiff attempts to bring this appeal as a declaratory judgment action to determine the maximum liability owed by Ohio Casualty and Hartford to plaintiff under their respective automobile liability policies. We find no present actual controversy sufficient to sustain jurisdiction under the Declaratory Judgment Act and, accordingly, we dismiss the appeal.

An actual controversy between adverse parties is a jurisdictional prerequisite for a declaratory judgment. *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 316 S.E. 2d 59 (1984). Provided an actual controversy exists, the liability of an insurance company pursuant to its insurance contract is properly the subject of a declaratory judgment. *Ramsey v. Interstate Insurors, Inc.*, 89 N.C. App. 98, 365 S.E. 2d 172, *disc. rev. denied*, 322 N.C. 607, 370 S.E. 2d 248 (1988). Our case law, however, recognizes the difficul-

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ty in determining whether a justiciable controversy exists. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E. 2d 25 (1986).

The Supreme Court in *Sharpe* stated that a justiciable controversy exists where "litigation appear[s] unavoidable." *Id.* at 589, 347 S.E. 2d at 32. In determining when litigation is unavoidable, the *Sharpe* court quoted an earlier opinion which distinguished those certain and definite events which give rise to declaratory judgments from those "remote, contingent, and uncertain events that may never happen and upon which it would be improper to pass as operative facts." (Emphasis in original.) *Id.* at 590, 347 S.E. 2d at 32 (quoting *Consumers Power v. Power Co.*, 285 N.C. 434, 451, 206 S.E. 2d 178, 189 (1974)). We may also look to federal court decisions in determining the justiciability issue. *Id.* at 584, 347 S.E. 2d at 29.

In *Bellefonte Reinsurance Co. v. Aetna Cas. and Sur. Co.*, 590 F. Supp. 187 (S.D.N.Y. 1984), plaintiffs, defendant's reinsurers, instituted a declaratory judgment action pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. section 2201, to determine their rights and liabilities under various reinsurance contracts with defendant. Plaintiffs' liability under the contracts, however, was predicated upon Aetna's liability to its insured, which was unresolved at the time. The district court held that no "present and unconditional danger" had been shown, but rather the danger was "contingent upon the happening of certain future or hypothetical events." *Id.* at 191. Because Aetna was not then liable to its insured, the court found that the action did not constitute an actual controversy and dismissed the case without prejudice.

Here the issue of liability has yet to be resolved. Ohio Casualty has presented defenses which could completely bar plaintiff's recovery. If Ohio Casualty was found not liable, an opinion here would be "a purely advisory opinion which the parties might . . . put on ice to be used if and when occasion might arise." *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E. 2d 450, 453 (1942). This we may not do.

In addition, should we not view this matter as a declaratory judgment action, the appeal still must be dismissed. All of the issues between all of the parties have not been decided and,

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therefore, this action is interlocutory and subject to dismissal.
Waters v. Personnel, Inc., 294 N.C. 200, 240 S.E. 2d 338 (1978).

For the foregoing reasons we dismiss plaintiff's appeal.

Dismissed.

Judges ORR and SMITH concur.

STATE OF NORTH CAROLINA v. MICHAEL DAVID BONNER

No. 875SC1165

(Filed 20 September 1988)

Embezzlement § 6— director of continuing education at technical school—no state funds held in trust—charge of embezzlement improper

The trial court should have dismissed embezzlement charges under N.C.G.S. § 14-91 for lack of evidence that defendant ever held any state funds in trust as required under that statute, where the evidence tended to show that defendant, as director of continuing education for a technical school, executed contracts with twenty-eight "bogus" instructors to teach nonexistent adult education classes to fictional students, and the bogus instructors then allegedly turned over to defendant a portion of their pay from the technical school; the power entrusted to defendant to hire instructors did not constitute the necessary power to possess or maintain control of the state funds which the school eventually paid those instructors; and defendant's alleged scheme thus did not misapply state funds he already possessed or could otherwise control but instead deceived those with such control into paying those funds to his co-participants in the scheme.

APPEAL by defendant from *Tillery (Bradford), Judge*. Judgment entered 27 May 1987 in Superior Court, PENDER County. Heard in the Court of Appeals 12 April 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John F. Maddrey, for the State.

Erdman, Boggs & Harkins, by Harry H. Harkins Jr., and Trawick, Pollock & Nunallee, by Gary E. Trawick, for defendant-appellant.

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GREENE, Judge.

Defendant was convicted on thirty-six counts of embezzlement by a state employee under N.C.G.S. Sec. 14-91 (1984) which provides that "if any . . . person . . . having or holding in trust . . . property and effects of the [State] . . . shall embezzle or knowingly and willfully misapply or convert the same to his own use, or otherwise willfully or corruptly abuse such trust, such offender . . . shall be punished as a Class F felon." (Emphasis added.) The State's evidence tended to show defendant was the Director of Continuing Education for Cape Fear Technical Institute ("CFTI") between 1980 and 1986. Pursuant to that position, defendant had the authority (subject to his superiors' approval) to hire instructors for CFTI. The State sought to prove that defendant executed contracts with twenty-eight "bogus" instructors to teach nonexistent adult education classes to fictional students. The bogus instructors then allegedly turned over to defendant a portion of their pay from CFTI. While defendant's employment also required him to collect and turn over certain student fees to CFTI, there was no evidence that defendant ever misdirected any of those fees.

Defendant moved to dismiss the charges for failure to establish defendant held any state funds in trust as required under Section 14-91. The trial court denied the motion and subsequently instructed the jury over defendant's objection that they could find defendant received state funds in trust if they found that he: 1) "was authorized to hire and direct payment to certain instructors up to the limit of the budget established for that purpose"; and 2) "that on the date in question [he] had available to him state funds within his teacher hiring budget sufficient to pay a newly hired continuing education instructor." Defendant appeals his conviction and assigns error to, among other things, the trial court's failure to grant his motion to dismiss the embezzlement charges under Section 14-91.

The dispositive issue presented is whether the trial court should have dismissed the embezzlement charges under Section 14-91 for lack of evidence that defendant ever held any state funds in trust as required under that statute. Although there are relatively few decisions applying this particular embezzlement

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statute, the requirement that defendant misapply funds which he "holds in trust" expresses the requirement distinctive to embezzlement that the defendant "received the property he embezzled in the course of his employment and by virtue of his fiduciary relationship with his principal." *State v. Kornegay*, 313 N.C. 1, 22, 326 S.E. 2d 881, 897 (1985); cf. Black's Law Dictionary at 658 (5th ed. 1979) (relevant definitions of "hold" all connote possession). Although defendant's possession of the entrusted property may be actual or constructive, even constructive possession of property requires "an intent and *capability to maintain control and dominion*" over it. *State v. Jackson*, 57 N.C. App. 71, 76, 291 S.E. 2d 190, 194, *disc. rev. denied*, 306 N.C. 389, 294 S.E. 2d 216 (1982) (quoting *State v. Spencer*, 281 N.C. 121, 129, 187 S.E. 2d 779, 784 (1972) (emphasis added)).

The State's theory at trial as embodied in the court's instructions was that defendant's authority to hire as many instructors as the budget set by CFTI would allow constituted holding state property in trust by virtue of defendant's alleged "control" of funds allocated by the CFTI education budget. Defendant's position as Continuing Director of CFTI may have enabled him to deceive CFTI into paying bogus instructors he hired; however, the State introduced no evidence to suggest defendant's position ever gave him the capability—either personally or in conjunction with others—to "maintain control and dominion" over any state funds at issue.

We note defendant required his superiors' ultimate approval to hire instructors. More important, the power entrusted to defendant to hire instructors did not in any event constitute the necessary power to possess or maintain control of the state funds CFTI eventually paid those instructors. The State's expansive theory of "constructive possession" fails to distinguish between being entrusted with constructive possession of property and gaining the necessary possession by deception: only the former constitutes holding state property in trust necessary for embezzlement under Section 14-91. Cf. N.C.G.S. Sec. 14-100 (1986) (setting forth requirements for crime of obtaining property by false pretenses).

As proven by the State, defendant's alleged scheme thus did not misapply state funds he already possessed or could otherwise

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control but instead deceived those with such control into paying those funds to his co-participants in the scheme. The cases cited by the State to support defendant's possession are all distinguishable since in each the defendant's employment gave him either actual possession of his principal's property or the capability to maintain control and dominion over it. *E.g., State v. Agnew*, 294 N.C. 382, 385, 241 S.E. 2d 684, 686, *cert. denied*, 439 U.S. 830 (1978) (defendant embezzled funds from state checking account over which she had "sole control" to make advances); *State v. Ward*, 222 N.C. 316, 320, 22 S.E. 2d 922, 923-24 (1942) (state auditor and subordinate misapplied revenues they collected for state); *Jackson*, 57 N.C. App. at 77, 291 S.E. 2d at 194 (defendant took delivery of hospital supplies and then misdirected them).

Embezzlement under Section 14-91 is a statutory offense which is strictly construed. *See State v. Ross*, 272 N.C. 67, 69, 157 S.E. 2d 712, 713 (1967). Even when we consider all the evidence in the light most favorable to the State and grant the State every reasonable inference from that evidence, we conclude the State failed to introduce substantial evidence that defendant misappropriated any state funds he held in trust under Section 14-91. We thus hold the trial court erroneously failed to grant defendant's motion to dismiss these embezzlement charges.

Accordingly, we arrest the judgment of the trial court and vacate defendant's convictions under Section 14-91. As we vacate defendant's convictions, we do not address his other assignments of error.

Vacated.

Judges ARNOLD and ORR concur.

Davis v. Vance County DSS

ROBERT DAVIS v. VANCE COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 889SC59

(Filed 20 September 1988)

1. Administrative Law § 4— order of State Personnel Commission not within required time—reinstatement of hearing officer's decision not available remedy

Though the State Personnel Commission's decision was delayed by a total of ten days beyond the time allowed by statute for rendering its decision, petitioner's requested relief, having the hearing officer's decision reinstated, was unavailable. N.C.G.S. § 150B-44 (1986) (amended 1987).

2. Administrative Law § 3; State § 12— recruitment of college graduates—refusal to accept equivalencies for educational requirement—no arbitrary or capricious action

The Department of Social Services did not act in an arbitrary and capricious manner in refusing to accept equivalent training and experience in the place of minimum educational requirements for an advertised position, and N.C.G.S. § 128-15 providing for “[e]mployment preference for veterans” would not allow petitioner to sidestep the educational requirement, since that statute specifically provides that preference will be given to “qualified veteran applicants.”

APPEAL by plaintiff from *Clark, Giles R., Judge*. Order entered 27 August 1987 in Superior Court, VANCE County. Heard in the Court of Appeals 7 June 1988.

Stainback & Satterwhite, by Paul J. Stainback, for plaintiff-appellant.

Harvey D. Jackson for defendant-appellee.

JOHNSON, Judge.

Petitioner, Robert Davis, filed a petition on 28 May 1987 for review of an adverse administrative decision rendered by the State Personnel Commission. He requested that the court: (a) declare the State Personnel Commission's decision unlawful; (b) reinstate the Administrative Law Judge's opinion; (c) order the State, by and through the Personnel Commission, to promulgate written guidelines for the consideration of equivalencies in education and experience requirements for employment purposes; and (d) order respondent to give petitioner first priority for promotion to any available future position he seeks, where he is able to meet

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qualification requirements through a combination of his education, experience and training.

Petitioner is an employee of the Vance County Department of Social Services and has been employed there since March 1977. In May 1986, the DSS sought applications for its Administrative Officer I position. The DSS indicated in numerous recruitment announcements that the minimum requirements were, "[g]raduation from a four year college or university and one year of experience in [p]ersonnel, budgeting, research, or administrative management, preferably in a Department of Social Services."

On 22 May 1986 petitioner notified personnel director, Sammy R. Haithcock, by letter that he was interested in being considered for the position. Haithcock responded in like manner on 23 May 1986. His response in pertinent part appears as follows:

Thank you for your interest in the position. However, I must advise you that the position requires a four-year degree and we are initially recruiting on that basis. As in many positions an equivalency rating is allowed as an option. At this time, we are not considering equivalencies. Should we reach a point in recruitment that it is deemed appropriate to do so, we will notify you.

Petitioner, who did not possess a four-year degree, was neither interviewed nor selected for the position. He then immediately requested a hearing before the personnel director and a subsequent hearing before the DSS. At both hearings, it was determined that the policy of requiring the four-year degree was not discriminatory, as the purpose for the requirement was to insure that both internal and external applicants received equal initial treatment.

On 7 July 1986, petitioner appealed these decisions to the Office of State Personnel and a hearing was held. He cited his grievance on the hearing request information form as the Agency's refusal to recruit below a four-year degree. The Administrative Law Judge concluded that the Vance County DSS had acted in an arbitrary and capricious manner, and recommended that petitioner be given first priority for future positions for which he was qualified based upon his education, training and experience.

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Respondent appealed this decision to the Full State Personnel Commission which dismissed the grievance on the basis of the lack of subject matter jurisdiction. The Commission also noted that even if subject matter jurisdiction had been present, the petitioner had failed to carry his burden of demonstrating an abuse of discretion by respondent, in having refused to consider equivalencies to the education level requirement.

On appeal to the superior court, the petition was dismissed. The court determined that the Commission's decision was supported by the record and was lawful in all respects. From this order, petitioner appeals.

On appeal, petitioner asks this Court to consider: (1) whether the hearing officer's decision should be reinstated because of the unreasonable delay by the Commission in reaching its decision, and (2) whether the respondent discriminated against petitioner by acting arbitrarily and capriciously in refusing to interview him for the position in question. We answer both questions in the negative.

[1] Petitioner first contends that the Commission's decision which was issued 130 days after it had received the official record from the hearing officer, was "unreasonably delayed" as defined in G.S. sec. 150B-44 (1986) (amended 1987). We respond that although petitioner has made an astute observation, the relief he seeks, in the form of having the hearing officer's decision reinstated, is simply unavailable. G.S. sec. 150B-44 (1986) (amended 1987) is entitled, "Right to judicial intervention when decision unreasonably delayed," and sets out the remedy which is available when the decision is delayed, within its heading. The statute provides further that:

Unreasonable delay on the part of any agency or hearing officer in taking any required action *shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or hearing officer.*

(Emphasis added.) See also, *In re Alamance Sav. & Loan Ass'n*, 53 N.C. App. 326, 280 S.E. 2d 748, disc. rev. denied, 304 N.C. 588, 291 S.E. 2d 148 (1981).

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The record discloses no attempt by petitioner to seek the only available remedy, the court order, after the Commission's decision had been delayed by a total of ten days beyond the time allowed by statute for rendering its decision. Therefore, the first assignment of error is overruled.

[2] Petitioner next contends that respondent's refusal to allow the education equivalencies to fulfill the position's minimum education requirements was an arbitrary and capricious action. Petitioner bases his argument upon a reading of G.S. sec. 128-15 which provides for "[e]mployment preference for veterans and their wives or widows." Although the statute awards a preference rating of ten points to veterans who apply for employment with the State or any of its departments, it states nowhere that the minimum requirements specified for a position may be ignored. In fact, the statute specifically states that "[a]ll the departments or institutions of the State, or their agencies, shall give preference in appointments and promotional appointments to *qualified* veteran applicants as enumerated in this section . . ."

Petitioner's employment history, including twenty years of "clerical/administrative" experience, coupled with his service during the Vietnam conflict, though noteworthy and commendable, did not enable him to meet the requirements established by the DSS, which recruited applicants under another prescribed and published basis.

It is for these reasons that we affirm the trial court's order dismissing the petition.

Affirmed.

Judges PARKER and COZORT concur.

Morris v. Morris

MARY GREY HOLLAND MORRIS v. GLENWOOD EUGENE MORRIS

No. 8811DC204

(Filed 20 September 1988)

Divorce and Alimony § 26.3— Virginia child support order—in personam and subject matter jurisdiction in North Carolina court

The district court erred in concluding that it did not have jurisdiction over the subject matter or the parties where plaintiff sought modification of a Virginia child support order; plaintiff and her children resided in North Carolina; N.C.G.S. § 50-13.7(b) gave the court subject matter jurisdiction; and defendant was personally served at his place of business in Pasquotank County, thus giving the court personal jurisdiction over him.

APPEAL by plaintiff from *Christian (William A.), Judge*. Order entered in open court on 29 September 1987 and signed 14 October 1987 in District Court, HARNETT County. Heard in the Court of Appeals 30 August 1988.

The parties were married on 3 August 1968 and were divorced on 23 May 1986 by decree of the Circuit Court of the City of Portsmouth, Virginia. By agreement incorporated in the court order, the parties have joint legal custody of their three minor children. Initially, defendant had physical custody of the children subject to the children's right to choose in the summer of 1986 the party with whom they wished to live. At the time this action was instituted, all three children were living with plaintiff in Harnett County, North Carolina.

The Virginia decree also ordered defendant to pay, in accordance with the parties' agreement, \$333.00 per month per child for support. The record does not indicate whether this child support order was ever registered in North Carolina as a foreign support order under the Uniform Reciprocal Enforcement of Support Act. G.S. Chap. 52A. On 13 April 1987, the Virginia court denied plaintiff's petition for an increase in the amount of child support. On 11 June 1987, plaintiff filed the complaint in the instant case in District Court, Harnett County, seeking modification of the Virginia child support order. Defendant, a Virginia resident, was personally served at his place of business in Pasquotank County. The district court concluded that the Virginia court had jurisdiction over the parties, the children and the issues of support and custody of the children. The district court also found that it did

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not have such jurisdiction and allowed defendant's motions to dismiss. Plaintiff appeals.

Bain & Marshall, by Elaine F. Marshall, for plaintiff-appellant.

W. Glenn Johnson for defendant-appellee.

SMITH, Judge.

Plaintiff assigns error to the order dismissing her complaint and to the sufficiency of the evidence, findings of fact and conclusions of law to support the order. We hold that the trial court erred by dismissing the claim and reverse.

The district court concluded that it did "not have jurisdiction over the issues of custody and support of the minor children born to the marriage of the plaintiff and the defendant, and jurisdiction in this matter should be declined . . . as a matter of law." Plaintiff contends the district court erred by dismissing her complaint. We agree.

We note that plaintiff's petition contains no request regarding custody or modification of the custody order. Therefore, G.S. Chap. 50A has no application.

Our legislature has provided for modification of foreign child support orders. G.S. 50-13.7(b). This statute provides in part:

When an order for support of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support which modifies or supersedes such order for support, subject to the limitations of G.S. 50-13.10.

Defendant contends, in part, that the use of the word "may" in this statute authorizes the trial court in the exercise of its discretion to refuse to exercise its jurisdiction. Defendant misconstrues the statute. We interpret the word "may" to authorize the trial judge to enter an order of modification upon a showing of changed circumstances.

To be entitled to modification under this statute, plaintiff must show both jurisdiction and changed circumstances. *Hopkins*

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v. Hopkins, 8 N.C. App. 162, 174 S.E. 2d 103 (1970). Both subject matter jurisdiction and personal jurisdiction are present in this case. The statute itself gives North Carolina courts subject matter jurisdiction to modify child support orders entered by another state. G.S. 50-13.7(b).

'It is true that one State cannot directly modify the provisions of a divorce decree of a sister State relating to child support. However, the State, upon gaining jurisdiction of the husband in personam, may enter a new order for child support which increases the amount that would have been payable prospectively under the divorce decree where the divorce court has the power to do so; and the State may declare that in this respect the decree of the divorce court shall be superseded by the new order. The full faith and credit clause does not forbid this result; the foreign decree has no constitutional claim to a greater effect outside the State than it has within the State.'

Thomas v. Thomas, 248 N.C. 269, 272, 103 S.E. 2d 371, 373 (1958), quoting 17A Am. Jur., Divorce and Separation, section 982, page 165. Personal service in North Carolina upon the nonresident defendant confers personal jurisdiction over him. *Jenkins v. Jenkins*, 89 N.C. App. 705, 367 S.E. 2d 4 (1988). Plaintiff has thus shown jurisdiction and may invoke G.S. 50-13.7(b).

Article IV, Section 1 of the United States Constitution requires that the 13 April 1987 Virginia order denying modification of the original child support order be given full faith and credit in North Carolina subject to modification under G.S. 50-13.7(b). *Thomas v. Thomas*, *supra*. Thus, whether plaintiff is entitled to relief under the statute depends on her ability to show changed circumstances since the 13 April 1987 Virginia order was entered; that issue is not before this court and must be considered by the trial court on remand.

Having determined that the trial court had jurisdiction over the subject matter and the parties, the order of the district court is reversed.

Reversed and remanded.

Judges EAGLES and ORR concur.

Shores v. Shores

CAROLYN SMITH SHORES v. GARY LEE SHORES

No. 8821DC31

(Filed 20 September 1988)

1. Divorce and Alimony § 26.3— increase in child support sought—child in North Carolina since 1982—North Carolina as home state

In a proceeding for an increase in child support, the trial court did not err in finding as a fact that North Carolina was the home state of the child where the child and plaintiff had resided in Winston-Salem since 1982.

2. Divorce and Alimony § 26.2— foreign child support order—no showing of changed circumstances—modification improper

The trial court erred in modifying an existing child support decree from Georgia where there were no findings of fact or conclusions of law showing a change of circumstances. N.C.G.S. § 50-13.7(b).

3. Rules of Civil Procedure § 12.1— lack of *in personam* jurisdiction—defense first raised on appeal—defense waived

Defendant waived his right to raise as a defense the trial court's lack of *in personam* jurisdiction because he failed to raise it in his answer or motions but presented it for the first time on appeal. N.C.G.S. § 1A-1, Rule 12(h)(1).

APPEAL by defendant from *Hayes, Roland H., Judge*. Judgment entered 7 August 1987. Heard in the Court of Appeals 11 May 1988.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow and Ronald B. Black, for plaintiff-appellee.

George M. Cleland for defendant-appellant.

JOHNSON, Judge.

Plaintiff, Carolyn Smith Shores, instituted this action on 12 May 1987 seeking child custody, child support, child support arrearages due under a previously entered separation agreement, and attorney's fees.

Plaintiff and defendant were married on 9 September 1972 in Forsyth County, North Carolina. They had one child from this union of marriage, to wit: Julian James Shores, born 8 January 1974. The plaintiff and defendant entered into a separation agreement on 7 April 1975. At this time, defendant lived in Cobb County, Georgia. On 13 June 1977, a final judgment and decree from the Superior Court of the State of Georgia awarded plaintiff

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custody of the child and ordered defendant to pay the sum of \$135.00 per month for child support. There were no other proceedings instituted concerning this issue of child custody until plaintiff filed the action which serves as the basis for this appeal.

Defendant was served with process on 20 May 1987. On 17 July 1987, defendant filed a motion to dismiss the action for lack of subject matter jurisdiction. Defendant also filed an answer on the same date.

On 20 July 1987, this matter was heard before Judge Roland H. Hayes upon the issue of child support and defendant's motion to dismiss. On 7 August 1987, an order was entered denying defendant's motion to dismiss and increasing the amount of child support to \$414.96 per month. On 17 August 1987, defendant gave notice of appeal.

[1] Defendant first contends that the trial court erred in finding as a fact that North Carolina is the home state of the child. There is no evidence to support this contention. According to the affidavit as to the status of the minor child, the child and plaintiff have resided in Winston-Salem, North Carolina since 1982. Pursuant to G.S. sec. 50A-3, it would be within the best interest of the welfare of the minor child to consider North Carolina the home state of the minor child, and for the court to assume jurisdiction, since the minor child and at least one parent have significant connections with North Carolina.

Defendant also argues that if North Carolina is considered the home state of the minor child, jurisdiction would be established for the purpose of determining custody only, and would not be established for the purpose of determining support issues. He relies upon *Miller v. Kite*, 813 N.C. 474, 329 S.E. 2d 663 (1985) to support his argument.

In *Miller*, our Supreme Court held that the moving party did not have the constitutionally required minimum contacts with North Carolina to permit a child support action to be maintained against him. While we totally agree with the apt articulation of this established principle, defendant has simply failed to properly preserve this issue of in personam jurisdiction on appeal. His waiver is discussed in the third assignment of error, *infra*.

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[2] Next, defendant argues that the trial court erred in modifying an existing support decree from the State of Georgia when there were no findings of fact or conclusions of law showing a change of circumstances to support such a conclusion. The defendant asserts that the Georgia divorce judgment precluded the North Carolina court from making any findings as to child support without a showing of a change in circumstances.

G.S. sec. 50-13.7(b) provides in part that:

When an order for support of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, *and upon a showing of changed circumstances*, enter a new order for support which modifies or supersedes such order for support, subject to the limitations of G.S. 50-13.10.

There is no indication in the record that defendant's income has changed since the Superior Court of the State of Georgia ordered him to pay \$135.00 per month child support. In the absence of any evidence and findings of any change in circumstances, it was error for the trial court to order an increase in the amount of child support. *Childers v. Childers*, 19 N.C. App. 220, 198 S.E. 2d 485 (1973). The judgment from the State of Georgia is entitled to full faith and credit.

[3] By his third Assignment of Error, defendant argues that the trial court erred in denying his motion to dismiss. We disagree. The substance of defendant's motion was a request for dismissal based upon the court's lack of subject matter jurisdiction, although he contends on appeal that the motion was for dismissal based upon lack of *in personam* jurisdiction.

It is clear to us that defendant waived his right to raise G.S. sec. 1A-1, Rule 12(b)(2) as a defense because he failed to raise it in his answer or motions but presents it for the first time on appeal.

G.S. sec. 1A-1, Rule 12(h)(1) states:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances . . . , or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

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Therefore, defendant's first and third assignments of error are overruled. Because the court failed to make findings of fact showing a change of circumstances before increasing the support order, we reverse on issue number two.

Affirmed in part; reversed in part.

Judge SMITH concurs.

Judge PHILLIPS concurs in the result.

OWEN MANLEY JONES v. O. J. CARROLL, JR. AND WIFE, GENEVA CARROLL

No. 8813DC217

(Filed 20 September 1988)

**Easements § 5.3— easement by implication— alternate means of ingress and egress
—reasonable necessity for easement**

The trial court's findings of fact were sufficient to support its conclusion that an easement by implication existed across defendants' land where the court found that title was separated when the parties' common predecessor in title divided the property he owned and conveyed the pieces of property in question to his two sons; the road in question was used before the separation, and the parties intended it to be permanent; that the road was extended in 1938 and moved in 1945 was of no consequence because these changes were made with the consent of all interested parties; and the road across defendants' property was reasonably necessary for the use, benefit, and enjoyment of plaintiff's property, even though an alternate means of ingress and egress existed, since it would have cost a large sum of money to make the other route usable, and the original parties intended the use of the road in question.

APPEAL by defendants from *Gore, Judge*. Judgment entered 12 October 1987 in District Court, BLADEN County. Heard in the Court of Appeals 7 September 1988.

This is a civil action wherein plaintiff seeks to establish an easement across the land of defendants. Following presentation of evidence of both parties the trial judge made findings of fact which, except as quoted, are summarized as follows:

Defendants' 79 acres of land lie east of and adjacent to N.C. Highway 410 while plaintiff's 82.5 acres lie east of and adjacent to defendants' land. No part of plaintiff's land touches the highway.

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Both pieces of property had a common predecessor in title, O. M. Jones, Sr. In 1936, the land now owned by defendants was conveyed by Jones to his son, J. B. Jones. In 1938, the other piece of property was conveyed by Jones to plaintiff. O. M. Jones, Sr., and his wife reserved life estates in each parcel. Jones died in 1938, and his wife died in 1951. After J. B. Jones' death, his widow became fee simple owner of the property which was subsequently conveyed to her daughter who then conveyed it to defendants in 1986.

Before 1936, a road about 20 feet wide existed leading from Highway 410 across the property now owned by defendants to a portion of plaintiff's property. The road was used by O. M. Jones, Sr., his family, farm workers and tenants for several years prior to 1936. In 1938, the road was extended because Highway 410 was moved. In 1945, all interested parties agreed to move the road 230 feet south to a location where it has been since then until defendants "disked up the road" and refused to allow plaintiff to cross their land.

In 1985, plaintiff was conveyed a right-of-way which connects another portion of his property to State Road 1112. Plaintiff has built no road to his property across the right-of-way. The cost of doing so would be from \$1,000 to \$4,000. The court found that it would cost \$400 to rebuild the road which was disked up, and found that the road across defendants' property is "reasonably necessary for the use, benefit and enjoyment of the plaintiff's property. . . ." The court further found that the common predecessor in title "expected and anticipated that the easement would run with the land. . . ."

The court concluded that plaintiff is entitled to a 20-foot easement and \$400 in damages. It then entered judgment, and defendants appealed.

Hester, Grady, Hester & Greene, by Gary A. Grady, for plaintiff, appellee.

Lee and Lee, by J. Stanley Carmical, for defendants, appellants.

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HEDRICK, Chief Judge.

Defendants base their only argument on 13 assignments of error and 13 exceptions noted in the record. While the assignments of error and exceptions raise a question of the sufficiency of evidence to support the findings of fact and conclusions of law based thereon, defendants only argue in their brief that the trial court incorrectly applied the law to the set of facts in this case, and that an easement should not have been found to exist.

We have reviewed the evidence, however, and we find it is sufficient to support the findings of fact made by the trial court. As for the conclusion based upon those findings of fact that an easement existed, the essentials of an easement by implication were set out in *Barwick v. Rouse*, 245 N.C. 391, 394, 95 S.E. 2d 869, 871 (1957):

(1) A separation of the title; (2) before the separation took place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained.

In this case, the trial court found that title was separated when O. M. Jones, Sr., divided the property he owned and conveyed the pieces of property in question to his two sons. This satisfies the requirement of separation of title. Likewise, the second requirement was satisfied because the road was used before the separation, and the parties intended it to be permanent. It has been openly and continuously used since then. That the road was extended in 1938 to meet Highway 410 and moved in 1945 is of no consequence. When there is no express grant providing otherwise, the location of an easement may only be changed by consent of both the landowner and easement owner. *Cooke v. Electric Membership Corp.*, 245 N.C. 453, 96 S.E. 2d 351 (1957). In this case, the trial court found that all location changes were made with the consent of all interested parties, and therefore the location of the road was properly changed.

As for the third requirement, defendants argue the easement is not necessary since another ingress and egress to a state road is now available to plaintiff's land. Although other jurisdictions

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require strict necessity for an easement by implication, it is well-established in this state that only reasonable necessity is required. *Dorman v. Ranch, Inc.*, 6 N.C. App. 497, 170 S.E. 2d 509 (1969). In this case, the trial court found the road across defendants' property "is reasonably necessary for the use, benefit and enjoyment of the plaintiff's property by him and his family." Evidence of an alternate ingress and egress is not conclusive proof that an implied easement is not reasonably necessary. *McGee v. McGee*, 32 N.C. App. 726, 233 S.E. 2d 675 (1977). Therefore, the trial court under the facts of this case did not err. The trial court found it would have cost a large amount of money to make the other easement usable, and that the original parties intended the use of the road in question. Defendants' argument has no merit.

Affirmed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA, APPELLEE v. GARY POWELL, APPELLANT

No. 8724SC1231

(Filed 20 September 1988)

Larceny § 7.8— felonious larceny from drugstore—sufficiency of evidence—mistrial on breaking or entering charge

Defendant could properly be convicted of felonious larceny pursuant to a breaking or entering, though there was a mistrial on the breaking or entering charge, and evidence was sufficient on the larceny charge where it tended to show that defendant's friend dropped him off in front of a drugstore with a duffel bag and a "bumper jack"; the friend immediately heard glass breaking and an alarm sound; he drove up the road two miles and then returned for defendant; the friend saw that defendant's duffel bag appeared heavy; the two left the area; defendant and his girlfriend examined the drugs which defendant had taken, discarding them when he discovered that they were not what he wanted; and the drugs were valued at over \$900.

APPEAL by defendant from *Griffin (Kenneth A.), Judge*. Judgment entered 28 May 1987 in Superior Court, AVERY County. Heard in the Court of Appeals 6 September 1988.

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Defendant was charged in a proper bill of indictment with felonious breaking or entering with intent to commit larceny in violation of G.S. 14-54(a) and felonious larceny and possession of stolen goods having a value of \$900.00 in violation of G.S. 14-72. The evidence at trial tends to show the following: On 7 February 1986 at approximately 3:00 a.m., Harold Peeler, a lifelong acquaintance of the defendant Gary Powell, drove defendant to Crossnore Drug Store so defendant could break in to steal the drugs, Valium and Dilaudid. Peeler let defendant out of the car in front of Crossnore Drug Store. Defendant was carrying a duffel bag and a "bumper jack." Immediately after defendant got out of the car, Peeler heard glass breaking and an alarm sound. On defendant's instructions, Peeler drove up the road two miles and then returned for defendant. When he returned to the drugstore to pick up defendant, Peeler saw that defendant's duffel bag appeared heavy. Peeler and defendant then left the area. Defendant and Peeler's girlfriend, Jennifer Auton, examined the drugs that defendant had taken. After discovering that he had not taken any Valium or Dilaudid, defendant left the drugs by the roadside.

Robert Taylor, owner and pharmacist of Crossnore Drug Store, testified that the large window at the front of the store had been knocked out, and a quantity of prescription drugs valued at \$922.78 was missing.

The jury was unable to reach a verdict on the breaking or entering charge, and the judge declared a mistrial. Defendant was found guilty as charged of felonious larceny. From a judgment imposing a prison sentence of 10 years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Archie W. Anders, for the State.

C. Gary Triggs for defendant, appellant.

HEDRICK, Chief Judge.

Defendant, by his Assignment of Error No. 5, contends the trial court erred in not arresting judgment on defendant's conviction of felonious larceny. He argues that since there was a mistrial as to the breaking or entering charge, the jury could not find him guilty of felony larceny pursuant to breaking or entering. "A motion in arrest of judgment is directed to some fatal defect ap-

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pearing on the face of the record." *State v. Goss*, 293 N.C. 147, 150, 235 S.E. 2d 844, 847 (1977). "When error does not appear on the face of the record proper, the judgment will be affirmed." *State v. Lindley*, 286 N.C. 255, 259, 210 S.E. 2d 207, 211 (1974). The bill of indictment, the verdict, and the judgment all conform. There is no defect on the face of the record. This assignment of error has no merit.

Defendant, by his Assignment of Error No. 3, contends the trial court erred in instructing the jury that it could return a verdict on the charge of felonious larceny pursuant to breaking or entering. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides: "No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection. . . ." Defendant failed to object before the jury retired to that portion of the judge's instructions to the jury to which he now takes exception, although the court gave him opportunities to object. Lacking a properly-preserved exception, this assignment of error has no merit.

Finally, defendant contends the trial court erred by denying defendant's motion "to dismiss the jury's verdict of felonious larceny for insufficiency of evidence to sustain a conviction." Under this assignment of error, defendant merely incorporates the arguments advanced under Assignments of Error No. 5 and No. 3. In reviewing the denial of a motion to dismiss, we must consider the evidence "in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime." *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E. 2d 118, 125 (1982). We have reviewed the evidence in the record and find it was sufficient to show that defendant took the goods, and the goods had a value in excess of \$400.00. This assignment of error has no merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges ARNOLD and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 SEPTEMBER 1988

CAMPBELL v. LLOYD No. 8814SC195	Durham (86CVS1630)	No Error
CRAWFORD v. McLAURIN TRUCKING No. 8810IC265	Ind. Comm. (I-991985)	Dismissed
E. F. CRAVEN CO. v. WATT PROPERTIES CO. No. 8726SC1118	Mecklenburg (86CVS622)	Affirmed in part and reversed in part
GRANT v. NASH GEN. HOSP. No. 887SC471	Edgecombe (86CVS625)	Affirmed
HEMBY v. MORTON No. 884DC440	Onslow (87CVD363)	Affirmed
IN RE BARBEE No. 8814DC257	Durham (86J115)	Affirmed
IN RE ESTATE OF BAGWELL No. 8828SC417	Buncombe (75E294)	Affirmed
IN RE ESTATE OF PEPPERS No. 8828SC416	Buncombe (75E582)	Affirmed
IN RE HOLLAND No. 878DC342	Wayne (86J79)	Affirmed
IN RE WYATT No. 8828DC366	Buncombe (81J108)	Dismissed
KIRBY BLDG. SYSTEMS v. McNIEL No. 883SC200	Carteret (84CVS790)	Vacated
KNIGHT v. KNIGHT No. 8825DC264	Caldwell (87CVD561)	Affirmed
M & M TRANSMISSIONS v. RAYNOR No. 875DC1182	New Hanover (84CVD3310)	Affirmed in part, remanded in part for further proceedings in accordance with this opinion
PARKER v. BROWER No. 8812SC103	Cumberland (86CVS867)	Affirmed
PFOUTS v. THE VILLAGE BANK No. 8815DC81	Orange (87SP147)	Appeal Dismissed

POSTON v. HIGH POINT BANK No. 8815SC3	Alamance (84CVS494)	Affirmed
STATE v. BALLARD No. 8825SC434	Catawba (87CRS12528)	No Error
STATE v. COLLINS No. 8813SC457	Columbus (87CRS9758)	No Error
STATE v. CROUCH No. 8812SC474	Cumberland (86CRS51126)	No Error
STATE v. FISHER No. 8821SC404	Forsyth (87CR30200) (87CR30201)	No Error
STATE v. HATHERLEE No. 8830SC410	Haywood (87CRS1171)	No Error
STATE v. HOFFMAN No. 8821SC62	Forsyth (87CRS4502)	No Error
STATE v. HOOPER No. 885SC522	New Hanover (87CRS17134) (87CRS17135)	No Error
STATE v. HOWIE No. 8826SC412	Mecklenburg (85CRS53906)	Affirmed
STATE v. JACOBS No. 8816SC435	Robeson (87CRS1526)	Affirmed
STATE v. LOGAN No. 8825SC510	Catawba (86CRS16617)	Judgment Arrested
STATE v. McKINNEY No. 8829SC461	McDowell (87CRS1902) (87CRS1903) (87CRS1904)	Remanded for Resentencing
STATE v. TWITTY No. 8827SC406	Gaston (87CRS13805) (87CRS13806)	No Error
STATE ex rel. TALLEY v. REID No. 8829DC509	Warren (87CVD241)	Reversed
STITT v. BOYKIN No. 8810DC1	Wake (86CVD5877)	Vacated and Remanded

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RICHARD D. TURNER, ADMINISTRATOR OF THE ESTATE OF JANE L. TURNER, PLAINTIFF v. DUKE UNIVERSITY, PRIVATE DIAGNOSTIC CLINIC, AND ALLAN H. FRIEDMAN, M.D., DEFENDANTS

No. 8814SC191

(Filed 4 October 1988)

1. Rules of Civil Procedure § 11— medical malpractice case—physician's name in medical records—no attempt to hide identity

The fact that the signature of the physician who examined plaintiff's wife on the afternoon before her death was contained in medical records to which plaintiff had access, that plaintiff was given the opportunity to discover the identity of that physician, and that the physician's name was made known to plaintiff in response to interrogatories precluded a conclusion that defendant actively or improperly sought to keep the physician's existence from plaintiff in contravention of N.C.G.S. § 1A-1, Rule 11.

2. Rules of Civil Procedure § 26— deposition of physician after particular date—physician not expert witness—court order not violated

In depposing a particular physician after 17 June 1987, defendant in a medical malpractice case did not violate an order requiring identification and deposition of expert witnesses prior to that date, since the physician in question was not questioned about the standard of care, was not retained for the purpose of litigation, and therefore was not an expert witness; rather, he had personally treated plaintiff's wife, and his testimony was limited in scope to the facts regarding his diagnosis and treatment of her. N.C.G.S. § 1A-1, Rule 26(b)(4).

3. Rules of Civil Procedure § 26— depositions not duplication of other expert testimony—no increased cost of litigation—sanctions not required

There was no merit to plaintiff's contention that sanctions should be imposed upon defendant for the taking of two depositions of physicians, since there was no evidence that testimony by one was duplicative of other expert testimony, that the depositions increased plaintiff's costs, or that the depositions were purposely scheduled to distract plaintiff from preparing for trial. N.C.G.S. § 1A-1, Rules 11(a) and 26(g).

4. Physicians, Surgeons and Allied Professions § 20— patient not examined by physician—condition not diagnosed—failure to show causal connection between physician's actions and death

The trial court in a malpractice action did not err in directing a verdict in favor of defendant physician where the evidence tended to show that plaintiff's intestate, who suffered from cancer and was in overall poor health, experienced constipation the day before her death; she was given an enema which perforated her bowel; she continued to experience abdominal cramping but was not examined by defendant; plaintiff's evidence that an examination of his intestate might have made a difference was insufficient to show that defendant's negligence proximately caused her death; and plaintiff's medical expert's

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assertion that defendant might have been the one doctor to detect her problem was mere speculation.

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by plaintiff from *Barnette (Henry V., Jr.) and Stephens (Donald W.), Judges*. Order entered 20 July 1987 and judgment entered 4 August 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 June 1988.

Plaintiff instituted this action on 25 July 1985 pursuant to G.S. 28A-18.1 alleging that defendants' negligence in the treatment and diagnosis of plaintiff's wife proximately caused her death on 27 August 1983. The matter came to trial on 27 July 1987. At the end of plaintiff's evidence, the trial court granted a directed verdict in favor of defendants Private Diagnostic Clinic and Dr. Friedman. The jury subsequently returned a verdict in favor of defendant Duke University (Duke).

On 17 July 1987, prior to the beginning of the trial, plaintiff filed a Motion for Sanctions against Duke pursuant to G.S. 1A-1, Rule 11(a), Rule 26(g) and Rule 37 alleging in part that Duke: (1) failed to comply with an order instructing Duke, in answering a set of interrogatories, to "provide this information [names and addresses of persons involved in the treatment of plaintiff's wife] as to specific individuals if requested at a later date by plaintiff's counsel"; (2) failed to comply with an order instructing Duke to identify before 17 June 1987 all expert witnesses that would be offered at trial; (3) failed to comply with an order instructing all parties to supplement outstanding interrogatories on or by 1 July 1987; and (4) noticed after 17 July 1987 depositions of two treating physicians (one located in Florida, one located in California), classified as experts, for an improper purpose and with the intent to harass plaintiff's counsel in contravention of Rule 11(a). After a hearing, plaintiff's motion for sanctions was denied. Plaintiff appeals both Judge Barnette's denial of his Motion for Sanctions and the trial court's granting of a directed verdict in favor of Dr. Friedman and Private Diagnostic Clinic.

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Jernigan & Maxfield, by Leonard T. Jernigan, Jr. and John A. Maxfield, for plaintiff-appellant.

Newsom, Graham, Hedrick, Bryson & Kennon, by E. C. Bryson, Jr. and Joel M. Craig, for defendants-appellees Private Diagnostic Clinic and Allan H. Friedman, M.D.

Yates, Fleishman, McLamb & Weyher, by Beth R. Fleishman and Barbara B. Weyher, for defendant-appellee Duke University.

SMITH, Judge.

I.

Plaintiff brings forth two assignments of error. Plaintiff first contends that Judge Barnette erred in denying his pre-trial motion to strike the notice of depositions of Dr. Rudolph Schereer in Florida and Dr. Robert Havard in California and in failing to impose mandatory sanctions under G.S. 1A-1, Rule 11 and Rule 26. Specifically, plaintiff contends: that Duke knew for months before trial of the existence of Dr. Havard, an alleged key witness, but waited until just prior to trial to notice Dr. Havard's deposition; that Dr. Schereer was an "expert" and allowing his deposition after 17 June 1987 violated the court order instructing Duke to identify all expert witnesses prior to 17 June 1987; that the depositions were a needless expense which unduly increased the cost of litigation; and that defendant purposely noticed the taking of these depositions seven days before trial to disrupt plaintiff's trial preparation.

Rule 11(a) states in pertinent part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it . . . is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction.

Similarly, Rule 26(g) provides that when an attorney or party signs a discovery document, he certifies to the best of his

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knowledge that it has not been served for an improper purpose and is not unreasonably burdensome or expensive. Violation of this rule subjects the attorney or party to sanctions.

G.S. 1A-1, Rule 26(g) was enacted in 1985 and the mandatory portion of G.S. 1A-1, Rule 11(a) was enacted in 1986. The effect of these provisions is to make available mandatory sanctions for violation of the rules. No North Carolina case has specifically addressed the issue of the standard of review which this court should utilize in reviewing sanction decisions by the trial court. The North Carolina Rules of Civil Procedure are for the most part verbatim recitations of the federal rules. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Decisions under the federal rules are therefore relevant for "guidance and enlightenment [to] develop the philosophy of the new [North Carolina] rules." *Johnson v. Johnson*, 14 N.C. App. 40, 42, 187 S.E. 2d 420, 421 (1972). The court in *Westmoreland v. CBS, Inc.*, 770 F. 2d 1168 (D.C. Cir. 1985), states that the purpose of Rule 11(a) is to require "[g]reater attention by the . . . courts to pleading and motion abuses . . . and to reduce the reluctance of courts to impose sanctions." *Id.* at 1173-74, quoting Federal Rules of Civil Procedure advisory committee note. In *Westmoreland*, plaintiff sought attorney fees and expenses for defendant's violation of Rule 11. The court stated:

Under Rule 11, sanctions may be imposed if a reasonable inquiry discloses the pleading, motion, or paper is (1) not well grounded in fact, (2) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay. In determining whether factual (1) or dilatory or bad faith (3) reasons exist which may give rise to invocation of Rule 11 sanctions, the district court is accorded wide discretion. For the district court has tasted the flavor of the litigation and is in the best position to make these kinds of determinations. . . . [O]nce the court finds that these factors exist, Rule 11 requires that sanctions . . . be imposed.

Id. at 1174-75 (emphasis in original). A reviewing court must consider whether the trial court based its decision on the relevant factors before it and whether the judgment was clearly erroneous. *Id.* But see *Thomas v. Capital Sec. Services, Inc.*, 836 F. 2d 866 (5th Cir. 1988).

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[1] In plaintiff's Rule 11 and Rule 26 claims on appeal, he makes three assertions. He first asserts that Duke was aware of the identity of a key witness, Dr. Robert Havard (the physician who examined plaintiff's wife on the afternoon before her death), well before noticing his deposition on 7 July 1987, but unreasonably and in violation of a court order withheld deposing him or making his identity known until just prior to trial. We disagree.

Although claiming to have been in the dark about the identity of Dr. Havard, plaintiff had ample opportunity to discover his existence. Plaintiff had early access to medical records in which Dr. Havard's signature, albeit illegible, appears. The record shows that on 25 April 1986 plaintiff filed with defendant a set of interrogatories in which he requested the names and addresses of any person known to have treated plaintiff's wife. When defendant answered by stating that all witnesses were listed in the medical records, plaintiff filed a motion to compel. The subsequent court order stated: "[A]s to Interrogatory No. 13, defendants are ordered to provide the name, address and telephone number as to specific individuals if requested by plaintiff's counsel at a later date." While the wording in this order is ambiguous, we interpret it to mean that Duke is required to supply the information requested if it is asked about specific individual persons. Dr. Havard's signature was part of the medical records. Plaintiff had only to ask specifically about the identity of the signator and defendant would have been obliged to supply it. Plaintiff never made this request; he merely resubmitted the same general request months later. Further, Dr. Havard's name was listed as a nonexpert witness in Dr. Friedman's 25 June 1987 answer to a set of plaintiff's interrogatories. Thus, plaintiff was aware of Dr. Havard's name approximately one month before trial. The fact that Dr. Havard's signature was contained in medical records to which plaintiff had access, that plaintiff was given the opportunity to discover the identity of that signator, and that Dr. Havard's name was made known to plaintiff in response to interrogatories precludes a conclusion that defendant actively or improperly sought to keep Dr. Havard's existence from plaintiff in contravention of Rule 11(a).

[2] Plaintiff next asserts that Dr. Schereer (who treated plaintiff's wife for lung cancer prior to her coming to Duke) was an expert witness and that by failing to depose him on or before 17

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June 1987, defendant violated an order requiring expert witnesses to be identified and deposed before 17 June 1987. We do not agree. The record reveals that the purpose of the deposition was to elicit the doctor's personal observations as to Mrs. Turner's medical condition. The focus of his deposition was his treatment of Mrs. Turner. While it is clear that by general definition all doctors may be considered experts in that they possess a specialized knowledge of medicine above that of the average layman, every doctor may not be considered an expert in his role as a witness in a legal controversy. G.S. 1A-1, Rule 26(b)(4) governs discovery through the use of experts. The advisory note to this rule contains the following observation:

It should be noted that the subsection does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Two Illinois cases are instructive on this point. In *Sheahan v. Dexter*, 136 Ill. App. 3d 241, 91 Ill. Dec. 120, 483 N.E. 2d 402 (1985), plaintiff sued defendant for malpractice. At trial defendant elicited testimony from treating physicians. On appeal, plaintiff assigned as error the admission of the physicians' testimony in that before trial they had not been disclosed as experts. In affirming the lower court, the appellate court stated:

Both doctors first testified to . . . scans they performed on plaintiff. . . . In addition, both doctors were asked . . . questions relating to whether fine needle biopsies were performed at the . . . [h]ospital and surrounding communities. . . . The two doctors were not asked to testify to the standard of care applicable, but rather were questioned as to the availability of alternative tests or treatment. . . . No error occurred in permitting them to state their knowledge of such factual matters.

Id. at 250, 91 Ill. Dec. at ---, 483 N.E. 2d at 408. Similarly, in *Waterford v. Halloway*, 142 Ill. App. 3d 668, 96 Ill. Dec. 739, 491 N.E. 2d 1199 (1986), another malpractice case, the plaintiff appealed a jury verdict in defendant's favor and contended in part that defendant's failure to designate before trial two doctors as ex-

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perts precluded their testimony. The lower court was affirmed for the reason that both of these doctors were treating physicians who were called to testify not about the standard of the plaintiff's care but about plaintiff's treatment and their choice of surgical procedures. The court further noted that neither doctor was called as an expert. In this case, Dr. Schereer was not questioned about the standard of care. His testimony was limited in scope to the facts regarding his diagnosis and treatment of plaintiff's wife.

Additionally, we note with approval the holding in *Krug v. United Disposal, Inc.*, 567 S.W. 2d 133 (Mo. 1978), in which the court concluded that the fact that defendant's manager was not listed as an expert did not preclude his testimony as to the value of a certain vehicle. The court stated:

The normal use of the term [expert] applies to a witness 'retained by a party in relation to litigation.' Here [the] witness was not retained by defendant to testify. He was defendant's maintenance manager, familiar with maintenance and the value of defendant's vehicles. He was defendant's alter ego and his knowledge of the extent of defendant's damages arose long before litigation.

Id. at 135-36. Duke did not retain Dr. Schereer for the purpose of litigation. He personally treated plaintiff's wife and his knowledge of her case arose before her death and before this litigation. For the foregoing reasons, we conclude that in deposing Dr. Schereer after 17 June 1987 Duke did not violate the order requiring identification and deposition of expert witnesses prior to that date.

[3] Plaintiff's last assertions concerning his Rule 11 and Rule 26 claim are that Dr. Schereer's deposition caused a needless increase in the cost of litigation because his testimony was duplicative of other expert testimony and that Dr. Schereer's and Dr. Havard's depositions were noticed in an attempt to thwart plaintiff's pre-trial preparation. The record is devoid of any evidence that these depositions either increased plaintiff's costs or were purposely scheduled to distract plaintiff from preparing for trial. The record does show, however, that during pre-trial discovery plaintiff raised the issue of the resectability of Mrs. Turner's cancerous tumor. Although another cancer or oncology expert was deposed and testified at trial about the viability of resectioning Mrs. Turner's tumor, Dr. Schereer was the surgeon who

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operated on and treated her cancer. We believe that his personal perspective and impressions were relevant and his deposition and testimony were not needlessly duplicative. The record reveals that plaintiff decided not to expend his time or money to attend either deposition, that at the motion hearing he declined the court's suggestion that the deposition be conducted by telephone, and that he specifically refused to move for a continuance to further prepare for trial. Additionally, we note that during the motion hearing when asked by the judge whether plaintiff would object to the doctors' testimony at trial based on the fact that defendant had violated a discovery order in regard to expert testimony, plaintiff responded in part that "if they want to fly them in, I suppose I would have no objection to them. . . ." We can find no evidence that plaintiff was unduly prejudiced by the taking of these depositions or that defendants set out to deliberately interfere with plaintiff's trial preparation.

After examination of plaintiff's contentions and the facts in this case, we find nothing to show that the lower court order was clearly erroneous. We therefore hold that the court properly denied plaintiff's motion.

II.

[4] We next address plaintiff's second assignment of error that the trial court erred in directing a verdict in favor of Dr. Friedman and Private Diagnostic Clinic at the end of plaintiff's evidence. To survive a motion for a directed verdict in a malpractice case, plaintiff is required to put on evidence showing (1) standard of care, (2) breach of the standard, (3) proximate cause and (4) damages. *Bridges v. Shelby Women's Clinic, P.A.*, 72 N.C. App. 15, 323 S.E. 2d 372 (1984), *disc. rev. denied*, 313 N.C. 596, 330 S.E. 2d 605 (1985). The failure to present sufficient evidence of any of these four elements entitles defendant to a directed verdict. *Id.* In assessing whether a directed verdict is proper, plaintiff's evidence must be taken as true and all evidence must be viewed in the light most favorable to plaintiff, giving plaintiff every favorable inference. *Manganello v. PermaStone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). Applying this standard to each element, we hold that plaintiff has failed to offer sufficient evidence that Dr. Friedman's negligence proximately caused Mrs. Turner's death.

Plaintiff's evidence in the light most favorable to him tends to show the following. Mrs. Turner was admitted to Duke Hos-

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pital on 25 August 1983 for evaluation and treatment of residual pain she was experiencing which arose from a condition known as herpes zoster or "shingles." Dr. Friedman was her treating physician. Upon admittance, it was noted by a neurology resident, Dr. Woodworth, that Mrs. Turner had been experiencing constipation and had been taking medication to alleviate that complaint. Dr. Woodworth then conducted a digital rectal exam but found her bowel sounds normal and her rectum empty. During that evening, she took two Dulcolax tablets for constipation but with no effect. On the morning of 26 August 1983, while Mrs. Turner was still asleep, Dr. Friedman stopped by her hospital room but, after checking her medical chart, did not enter her room to examine her. Upon awakening and throughout the morning, Mrs. Turner complained of constipation and abdominal cramping. Around 11:00 a.m., Dr. Woodworth ordered that Mrs. Turner be given a saline enema to alleviate her constipation. If there were no results from the enema, he ordered that she be given a half bottle of magnesium citrate. The second half of the magnesium citrate was to be administered at around 2:00 p.m. if Mrs. Turner had not experienced any relief. Neither the enema nor the magnesium citrate produced any positive result. Mrs. Turner made numerous attempts to have a bowel movement and continued to complain of abdominal cramping. At approximately 2:00 p.m. she was moved to a room in a different wing of the hospital where patients with neurological complaints were concentrated. Mrs. Turner was also given the second half of the magnesium citrate. Around 3:30 p.m., Dr. Robert Havard, an oncologist called upon by Dr. Friedman to evaluate the condition of Mrs. Turner's cancer, visited Mrs. Turner and examined her. During his examination, she continued to make trips to the bathroom to alleviate her constipation but with no results. Dr. Havard noted on Mrs. Turner's chart that she was experiencing "extreme abdominal discomfort." Around 5:00 p.m., plaintiff, who had remained with his wife throughout the day, became increasingly concerned about her abdominal pain, rang for a nurse and requested a doctor to check her. Plaintiff was told that the doctors were making rounds and would attend his wife when they reached her room. At 6:00 p.m., the doctors, including Dr. Woodworth, stopped at Mrs. Turner's room but despite plaintiff's requests did not examine Mrs. Turner at that time. Sometime between 7:00 and 8:00 p.m., plaintiff saw Dr. Woodworth in the hall and asked him to check his wife. When Dr.

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Woodworth examined Mrs. Turner, her bowel was distended, she was breathing heavily, and her skin was clammy. He immediately left to order a blood work-up and x-rays and to contact the general surgeon on duty. Upon his return to Mrs. Turner's room, her blood pressure had dropped, she was unresponsive and in shock. Around 12 midnight, Mrs. Turner underwent surgery and it was discovered that her bowel was perforated and that the damage was irreparable. Mrs. Turner died on 27 August 1983 at 4:10 a.m. The autopsy report listed the cause of death as acute peritonitis caused from the bowel perforation. The medical examiner determined that the perforation was caused by the enema administered on 26 August 1983. During the course of the events on 26 and 27 August, Dr. Friedman never actually visited Mrs. Turner. Dr. Friedman did testify that on the afternoon of 26 August he attempted to visit Mrs. Turner but was informed that she had been moved to another room. He also testified that after reviewing her chart and talking to Dr. Havard, who had examined Mrs. Turner, he determined that there was nothing unusual on her chart requiring his attention.

It was plaintiff's theory at trial that Dr. Friedman, as attending physician, violated a standard of care by failing to attend, diagnose and treat Mrs. Turner and that this failure precluded discovery of her worsening condition which led to her death. Plaintiff contends that these failures proximately caused her death. Plaintiff's expert witness, Dr. William Pace, testified that had Dr. Friedman examined Mrs. Turner he might have been the only doctor to correctly diagnose her condition and that his failure to conduct an examination violated the standard of care. He further testified that it was his opinion that Dr. Friedman's violation of the standard of care proximately caused Mrs. Turner's death. However, on cross-examination, the following exchange took place:

Q. All right. Now, is it not true . . . Let me ask you this. If Dr. Friedman had seen Mrs. Turner at 3:00 in the afternoon, some thirty minutes before Dr. Havard, the internist, had seen her? It would not have made any difference the diagnosis, of her condition, would it?

A. We've got to do a hypothetical assumption that Dr. Havard did see her at 3:30 and that Dr. Friedman did try to

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see her at 3:00 and somewhere in that half an hour she appeared, got into bed and was available for examination. And it wouldn't have made a difference.

Q. But I want you to assume . . .

A. Very difficult. But all right. I'll assume. It probably wouldn't have made much difference.

and

Q. My question was, if Dr. Havard, the internist who specialized in internal medicine, how [sic] could have hung out his shingle, didn't pick it up, less chance of Dr. Friedman would have picked it up, is that not true?

A. Probably.

Additionally, although Dr. Pace did testify that a perforation of the bowel was reversible, it was Dr. Friedman's testimony that given Mrs. Turner's overall poor health, he "may or may not" have been able to save her life if he had discovered her condition on the afternoon of 26 August.

When a trial court's determination regarding a directed verdict is a close one, the better practice is to allow the case to go to the jury. *Manganello, supra*. However, if the evidence fails to establish a causal connection between the alleged negligence and the injury, a directed verdict in favor of defendant is proper. *Weatherman v. White*, 10 N.C. App. 480, 179 S.E. 2d 134 (1971).

The burden was therefore upon the plaintiff to show that defendant's alleged negligence proximately caused his intestate's death, and the proof should have been of such a character as reasonably to warrant the inference of the fact required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact . . . '[E]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury.' (citation omitted) . . . The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further and offer at least some evidence which reasonably tends to prove every fact essential to his success.

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Byrd v. Express Co., 139 N.C. 273, 275-76, 51 S.E. 851, 852 (1905). Plaintiff's evidence, even when viewed in the light most favorable to him, merely shows that an examination of Mrs. Turner on the afternoon of 26 August might have made a difference but "probably not." Dr. Pace's assertion that Dr. Friedman might have been the one doctor to detect her problem is mere speculation. "Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances." *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E. 2d 203, 206 (1988). Therefore, we hold that the trial court did not err in granting defendant's motion for a directed verdict.

Affirmed.

Judge ORR concurs.

Judge PHILLIPS concurs in part and dissents in part.

Judge PHILLIPS concurring in part and dissenting in part.

Though I do not believe that the trial judge's failure to impose sanctions against Duke University and strike the last minute depositions of Drs. Scheerer and Havard constituted reversible error, the University's patent evasiveness in regard to those witnesses is viewed by the majority with too tolerant an eye in my opinion. In this State discovery is not just a search for information relating to a case with it being immaterial where the information is obtained; litigants have the right to ascertain without quibble or evasion what their adversaries know about the facts in litigation, and that the inquirer may already know the same thing or can find out elsewhere is irrelevant. Thus, plaintiff had the right to have the University state under oath the names and addresses of the persons that it knew had treated the decedent, and its purported answer, "See medical records," was no answer at all and can only be characterized as evasive; and the evasiveness was rendered frivolous by the fact that the hospital's record is only a few pages long and most of the signatures are illegible.

On the other hand, the majority's view of plaintiff's evidence is too narrow. Dr. Pace's testimony that Dr. Friedman's failure to

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examine his patient during the afternoon when her condition was obviously deteriorating violated the standard of care and proximately caused her death raised a question of fact for the jury; a question that was not eliminated by the contradictory testimony referred to in the opinion, since weighing contradictions in evidence is the jury's function, not ours.

Furthermore, plaintiff's evidence also raised a question of fact as to whether Mrs. Turner's death was proximately caused by Dr. Friedman's negligent failure to diagnose and treat her dangerous state of constipation, as alleged in Paragraph 47(b) of the complaint. Though Dr. Friedman admitted that he was aware that she had been taking medicines that caused constipation and said he would have been surprised if she had not been constipated, the evidence indicates that neither he nor any of his many assistants did anything whatever to ascertain the extent of her constipation before prescribing the enemas which literally blew out the wall of her colon. For the record that defendants made of the inquiries and examinations that were made of this patient contains no indication whatever that she or anyone else was asked when her last bowel movement was, or that any physician or anyone else felt her abdomen which then contained, as surgery soon revealed, "bucketsful of stool" that had been accumulating in her colon for a long time. This evidence, in my opinion, along with evidence that less than two days before her death decedent walked into the hospital seeking treatment and during the time she was there her husband tried on several occasions to get somebody to attend her for the intense abdominal pain she was suffering, is sufficient, even in the absence of expert testimony, to permit a jury to infer that the medical care Mrs. Turner received did not meet even the most rudimentary standards, much less those adhered to by nationally ranked medical centers, and that her death resulted therefrom. But there was expert testimony on this issue. In substance, Dr. Pace testified that: The applicable standard required a physician treating a patient known to be constipated to at least ask the patient when the last bowel movement was and to determine by carefully feeling the abdomen whether the colon was full of stool before prescribing the enemas; that such an examination would probably have disclosed Mrs. Turner's condition since she was a frail woman and her abdomen then con-

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tained an enormous quantity of stool; and that neither of these steps was taken was a deviation from that standard.

Thus, my vote is not to disturb the judgment in favor of Duke University, but to grant the plaintiff a new trial against the other defendants.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, COM-
PLAINANT v. REBARCO, INC., RESPONDENT

No. 8810SC197

(Filed 4 October 1988)

1. Master and Servant § 114— existence of recognized hazard—application of reasonable man standard proper

The OSHA Review Board acted properly in applying the "reasonable man" standard in determining whether a "recognized hazard" existed in respondent's workplace under N.C.G.S. § 95-129(1).

2. Master and Servant § 114— method of bracing concrete forms—recognized hazard—employer's knowledge—sufficiency of evidence

Evidence that the practice of respondent, a concrete and steel reinforcing subcontractor, was to remove a crane from a concrete form before attaching all braces to the form, that the braces assured that the form was perpendicular to the floor and added stability, that forms lost stability when a worker scaled them to attach the braces and extra workers were stationed at the base of the form to provide support when an employee was on the column, that the form would not have tipped over had the crane been attached, and that respondent, during required safety meetings, warned workers about sudden movements when working on the columns was sufficient to show that respondent's practices presented a hazard; respondent was aware of the hazard; and a reasonably prudent person would consider respondent's practices a hazard. Such findings supported the OSHA Review Board's conclusion that respondent's practice was a "recognized hazard" under N.C.G.S. § 95-129(1).

3. Master and Servant § 114— recognized hazard in workplace—existence of means to abate hazard—sufficiency of evidence

Evidence was sufficient to support the OSHA Review Board's finding that feasible and effective means existed to abate a hazard in respondent's workplace by keeping a crane attached to a concrete form while bracing was completed, rather than removing the crane after only one brace was in place, and the Board's decision citing respondent for a violation of N.C.G.S. § 95-129(1) was binding, even though there was evidence that exclusive use of the crane for the additional time it would take to complete the bracing of the forms would be cost prohibitive.

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4. Master and Servant § 114— recognized hazard in workplace—foreseeability of injury—sufficiency of evidence

Evidence was sufficient to support the OSHA Review Board's finding that it was foreseeable that the hazard in this case could result in serious injury or death, and respondent failed to sustain its burden of proof with respect to its defense that the employee's reckless behavior caused the accident.

5. Master and Servant § 114— failure to maintain safe electrical plugs and extension cords—employer as owner of plugs—sufficiency of evidence

Evidence was sufficient to support the OSHA Review Board's conclusion that respondent violated 29 CFR 1926.402(a)(4) by failing to maintain safe electrical plugs and extension cords where such evidence tended to show that the cords and plugs in question were in an exposed area, open to inspection, and in fact used by respondent's employees; furthermore, whether respondent owned the plugs was not the determinative factor, since an employer in a multi-employer work site is expected to make reasonable efforts to detect and abate any violation of safety standards of which it is aware and to which its employees are exposed despite the fact that the employer did not commit the violation.

APPEAL by respondent from *Bowen (Wiley F.), Judge*. Order entered 29 October 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 30 August 1988.

Respondent is a North Carolina corporation doing business as a concrete and steel reinforcing subcontractor. On 15 July 1983, respondent's employee, Larry Daniel Stout, was killed when a 14-foot-high, 400-pound concrete form from which he was suspended tipped over and fell on him. At the time of this incident, respondent was involved in the construction of the Johnston County Memorial Hospital in Smithfield, North Carolina. On 18 July 1983, Tim Childers, a safety officer with the Occupational Safety and Health Division of the North Carolina Department of Labor, visited the construction site to investigate the accident. As a result of the investigation, Childers recommended that two citations be issued against respondent. He recommended that respondent be cited for a violation of 29 CFR 1926.701(a)(1) which required that formwork and shoring be designed, erected, supported, braced and maintained in a manner which would safely support lateral and vertical loads. Childers discovered electrical extension cords had been pulled loose from the plug cover causing strain on the terminal wire, and further recommended that a citation be issued for a violation of 29 CFR 1926.402(a)(4) (as it existed in 1983) which required use of attachment plugs that could endure rough

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use and have cord grips to prevent strain on the terminal screws. On 26 August 1983, the citation alleging a violation of 29 CFR 1926.701(a)(1) was amended to allege in the alternative a violation of G.S. 95-129(1). Respondent was assessed a penalty of \$420.00 for the formwork and shoring violations.

On 31 August 1983, respondent filed a notice to contest the citations and proposed penalty with the Occupational Safety and Health Review Board (Review Board). On 7 February 1985, a hearing examiner filed an order affirming the issuance of both citations and the proposed penalty. However, he concluded that 29 CFR 1926.701(a)(1) did not apply to the work in which respondent was engaged when the accident occurred. On 7 March 1985, respondent petitioned for review of the hearing examiner's order with the Review Board. The Board affirmed the examiner's decision on 6 December 1985. On 8 January 1986, respondent filed a petition in the Superior Court of Wake County requesting judicial review. The Superior Court entered an order on 29 October 1987 affirming the Review Board's decision. Respondent appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Melissa L. Trippe, for appellee.

Johnson, Gamble, Hearn & Vinegar, by Richard J. Vinegar and Kathleen M. Waylett, for respondent-appellant.

SMITH, Judge.

Briefly, we outline the construction practices which constitute the basis of the formwork and shoring violation involved in this case. At the time of the incident, respondent was in the process of constructing concrete columns. This process involves erecting a hollow steel-framed form into which concrete is poured. The form, in this case a 14-foot-high, one-foot-wide, 400-pound form, was set in place by a crane. It was placed over steel rebar (cylindrical steel rods) which protruded from the floor and over wire mesh both of which extended the length of the form. After the form was set in place by a crane, a worker would scale the side of the form, attach his safety belt, and nail into the form one of several four-inch by four-inch (4" x 4") braces. The worker would then unhook the crane and nail into the form the remainder of the braces. The process of securing these braces took only a few minutes to complete. The braces were attached to provide

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stability and assure that the form was perfectly perpendicular to the floor. Additional workers were stationed at the base of the form to stabilize the column and provide assistance to the worker on the form. The Review Board found that respondent's practice of having an employee climb the form and unhook the crane before all the braces were in place rendered the form temporarily unstable and exposed employees to a hazard of the form tipping.

Respondent brings forth as its sole assignment of error the trial court's affirmance of the Review Board's decision upholding the safety violations. It raises the following four issues in its brief:

1. Whether the Board properly interpreted the phrase "recognized hazard" as that phrase is used in G.S. 95-129(1) . . . ;
2. Whether there is substantial evidence in view of the entire record . . . to affirm the alleged . . . violation under G.S. 95-129(1);
3. Whether there is substantial evidence in view of the entire record . . . to support the Board's affirmance of a . . . violation of 29 CFR 1926.402(a)(4); and
4. Whether the decision of the Board is arbitrary and capricious.

Unless provided for by specific statute, judicial review of administrative decisions is governed by Chap. 150B, Art. 4. G.S. 150B-43. The standard for review is set forth in G.S. 150B-51(b) and states in pertinent part:

[T]he court reviewing a final decision may affirm . . . or remand It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are . . .

- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

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The proper standard to be applied depends on the issues presented on appeal. Our courts have held that if it is alleged that an agency's decision was based on an error of law then a *de novo* review is required. *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 281 S.E. 2d 24 (1981). "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Id.* at 580-81, 281 S.E. 2d at 29, quoting *Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 465, 276 S.E. 2d 404, 410 (1981). A review of whether an agency decision is supported by sufficient evidence requires the court to apply the "whole record" test. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The "whole record" test is also applied when the court considers whether an agency decision is arbitrary and capricious. *High Rock Lake Assoc. v. Environmental Management Comm.*, 51 N.C. App. 275, 276 S.E. 2d 472 (1981).

[T]he 'whole record' rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson, 292 N.C. at 410, 233 S.E. 2d at 541.

Complainant cites G.S. 95-129(1) as the basis for its citation against respondent for a serious violation. This statute, often referred to as "the general duty clause," states that "[e]ach employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm." This statute closely parallels the federal general duty clause found at 29 U.S.C.A. Section 654(a)(1). Respondent correctly points out in its brief that North Carolina courts have yet to specifically address the interpretation of this clause; therefore, because of the similarity between the state and federal provisions, we turn to federal decisions for guidance. See *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980)

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(Court held that similarity between federal and state FTC statutory provisions allowed state court to seek guidance from federal decisions). Federal courts have held that to successfully prosecute a violation under the "general duty clause" a complainant must show that an employer failed to render its workplace free of a hazard which was "recognized" and causing or likely to cause death or serious physical harm. *National Rlty. & C. Co., Inc. v. Occupational S. & H.R. Com'r.*, 489 F. 2d 1257 (D.C. Cir. 1973).

[1] Respondent first argues that the Review Board's erroneous interpretation of a "recognized hazard" resulted in the application of an inappropriate standard. Incorrect statutory interpretation by an agency constitutes an error of law under G.S. 150B-51(b) and allows this court to apply a *de novo* review. *Brooks, supra*. A "recognized hazard" has been defined as one about which the employer knew or one known about within the industry. *Usery v. Marquette Cement Mfg. Co.*, 568 F. 2d 902 (2nd Cir. 1977). This definition has been conditioned upon a recognition that not all hazardous conditions can be prevented and that Congress, by the absolute terms of the "general duty clause," did not intend to impose strict liability upon employers. Only preventable hazards must be eliminated. *National Rlty. & C. Co., Inc., supra*. Thus, "a hazard is 'recognized' only when the [Commissioner] demonstrates that feasible measures can be taken to reduce materially the likelihood of death or serious physical harm resulting to employees." *Babcock & Wilcox Co. v. Occupational Safety, Etc.*, 622 F. 2d 1160, 1164 (3rd Cir. 1980).

In its decision, the Review Board in this case concluded: "[w]hether or not a hazard exists is to be determined by the standard of a reasonable prudent person. Industry custom and practice are relevant and helpful but are not dispositive. If a reasonable and prudent person would recognize a hazard, the industry cannot eliminate it by closing its eyes." It is respondent's contention that the standard adopted by the Review Board is not the proper standard to apply when considering whether a "recognized hazard" exists under G.S. 95-129(1). Respondent argues that a "recognized hazard" is present when the industry as a whole deems it so.

We conclude that the Review Board applied the correct standard to determine whether respondent failed to render its

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workplace free of a "recognized hazard." In *Daniel Construction Co. v. Brooks*, 73 N.C. App. 426, 326 S.E. 2d 339 (1985), a case involving the violation of a specific federal safety standard, our court, after reviewing relevant federal decisions, applied a "reasonable man" standard in considering the safety violation and declared:

In order to establish that Daniel violated 29 CFR 1926.28(a) as charged in the citation, OSH had to prove that under the circumstances which existed a reasonably prudent employer would have recognized that carrying heavy objects above their unprotected feet was hazardous to the employees doing the carrying and would require them to wear safety toe shoes. Though this is but an adaptation of the "reasonable man" standard of the common law, neither this Court nor our Supreme Court, according to our research, has yet stated the factors that may be considered in applying the standard in cases like this. For example, the Fifth Circuit has apparently interpreted 29 CFR 1926.28(a) 'to require only those protective measures which the knowledge and experience of the employer's industry, which the employer is presumed to share, would clearly deem appropriate under the circumstances.' Under this interpretation, as we read it, each industry is permitted to evaluate the hazards associated with its own operations and determine what, if anything, to do about them. But as applied by the First and Third Circuits, the practice in the industry is but one circumstance to consider, along with the other circumstances, in determining whether a practice meets the reasonable man standard. These courts have noted, quite properly we think, that equating the practice of an industry with what is reasonably safe and proper can result in outmoded, unsafe standards being followed to the detriment of workers in that industry. This latter application is much the sounder, we think, and we adopt and employ it in this case.

Id. at 430-31, 326 S.E. 2d at 342 (citations omitted) (emphasis in original). We are aware that *Daniel* involves a specific federal safety standard as opposed to the "general duty clause," but the duty imposed upon employers in cases involving a specific safety standard have been found analogous to the duty imposed by the "general duty clause." *General Dynamics v. Occupational Safety*

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& Health, 599 F. 2d 453, n.7 (1st Cir. 1979). Based on the foregoing, we conclude that the standard adopted by the Review Board in this case was proper.

[2] Respondent argues that there was insufficient evidence in view of the entire record to support the Review Board's conclusion that respondent violated G.S. 95-129(1). Specifically, it contends that the evidence failed to show that (1) a "recognized hazard" existed; (2) respondent was aware of a hazard; (3) the industry recognized respondent's formwork practices as hazardous; (4) a feasible alternative existed to respondent's allegedly hazardous practices; and (5) it was foreseeable that respondent's practices could result in death or serious injury. Additionally, respondent contends that ample evidence existed that the accident was the result of the employee's idiosyncratic behavior and that the Review Board erroneously failed to make a finding to that effect. A review of the record in this case indicates that some contradictory evidence exists as to the safety of respondent's practices and the deceased employee's actions which may have contributed to the accident.

Substantial evidence existed that although one of the purposes of the bracing was to assure that the form was plumb and perpendicular with the ground, another purpose was to stabilize the form. Keith Long, an employee of respondent, testified that the primary purpose of applying the braces was to keep the form straight, but he acknowledged that they do add additional reinforcement. Safety inspector Childers testified that interviews with respondent's employees revealed that, subsequent to the accident, there had been discussions about the possibility of keeping the crane attached to the form in an effort to address the hazard. Respondent's employees also stated that the purpose of the bracing was to steady the form. Additionally, testimony of long-time Rebarco employee Hal Warmbrod indicated that the column was stable without the support of the crane, but that it lost stability when extra weight (such as a person working on the column) was placed near the top of it. As a result, extra workers were stationed at the base of the form to provide support when an employee was on the column. In a witness statement made to inspector Childers during the accident investigation, Keith Long stated that "when it [the crane] was unhooked, the column started swaying, and then fell." Further testimony showed that the form

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could fall despite the presence of the steel rebar and wire mesh and that had the crane remained attached to the form it would not have tipped over. Evidence was also received that respondent, during required safety meetings, warned workers about sudden movements when working on the columns. This evidence is sufficient to show not only that respondent's practices presented a hazard but also that it was a hazard of which respondent was aware. The evidence also shows that a reasonably prudent man would consider respondent's practices a hazard and supports the Review Board's conclusion that respondent's practice was a "recognized hazard" under G.S. 95-129(1).

[3] The Review Board further found that feasible and effective means existed to abate the hazard by keeping the crane hooked to the form while the bracing was completed. The Review Board also found that although rental on a crane cost \$60.00 per hour, the process of bracing each column took only about two minutes. Testimony to that effect was received at the hearing. However, testimony was also introduced that the exclusive use of a crane for the additional time it would take to complete the bracing of the forms would be cost prohibitive. Despite the contrary nature of the testimony, sufficient evidence does exist to support the Review Board's finding. *See Thompson, supra.* If reliable evidence exists to support the agency's findings and conclusions, its decision is binding. *Dept. of Correction v. Gibson*, 58 N.C. App. 241, 293 S.E. 2d 664 (1982), *rev'd on other grounds*, 308 N.C. 131, 301 S.E. 2d 78 (1983).

[4] The Review Board also found that it was foreseeable that the hazard in this case could result in serious injury or death. We hold that such a finding is supported by the evidence. The record reveals that a 14-foot, 400-pound steel form fell over and crushed respondent's employee to death. "The fact that an activity in question actually caused one death constitutes at least *prima facie* evidence of likelihood: 'the potential for injury is indicated . . . by [Stout's] death and, of course, by common sense.'" *Usery*, 568 F. 2d at 910, quoting in part *National Rlty. & C. Co., Inc.*, 489 F. 2d at 1265 n.33.

It is respondent's contention that Stout's own idiosyncratic behavior in swinging himself suddenly from one side of the form to the other caused it to fall and that respondent's duty as an

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employer to provide a safe working environment does not extend to such behavior. While we agree with respondent's latter point, we are unable to agree with its former assertion. It is undisputed from the testimony that Stout made a sudden, unannounced movement on the form. However, testimony describing the movement ranged from "swinging wildly" to "sudden shift of his [Stout's] weight." It is also unclear from the record whether Stout's actions were the result of his own wilful and reckless behavior or the result of a loss of footing. What the testimony shows is that Stout had previous experience climbing the forms and had never engaged in reckless behavior. Further, the testimony revealed that Stout had been warned against making sudden movements while working on the forms. From the foregoing, we hold that the Review Board's conclusion that respondent failed to sustain its burden of proof with respect to its defense that Stout's reckless behavior caused the accident was correct. Our courts, in applying the "whole record" test, have noted that "[t]he 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views." *Thompson*, 292 N.C. at 410, 233 S.E. 2d at 541. Therefore, after considering the entire record, we hold that the evidence is sufficient to support the Review Board's conclusion that respondent violated G.S. 95-129(1) and that the trial court's affirmance of the Review Board's decision was proper.

[5] We next address respondent's contention regarding the violation of 29 CFR 1926.402(a)(4). Specifically, respondent alleges that there was sufficient evidence to show that the plugs and extension cords in question did not belong to respondent and that it took extensive measures to maintain its own electrical equipment. Again, testimony in the record is conflicting as to whom the equipment belonged. Childers testified that the cords in question were in plain sight and that he was told by employee Hal Warmbrod that respondent owned the cords. However, employee Roger Bowder testified that respondent did not own the cords and that respondent had just completed maintenance of its own cords.

Whether respondent owned the plugs and cords is not the determinative factor in this case. The general rule as to employer culpability for safety violations is that each employer is responsible for the safety of his own employees. Grossman Steel and Aluminum Corp., 1976-76 O.S.H. Dec. (CCH) paragraph 20,691

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(May 12, 1976). However, this rule has been modified in cases involving multi-employer work sites. *Id.* An employer is expected to make reasonable efforts to detect and abate any violation of safety standards of which it is aware and to which its employees are exposed despite the fact that the employer did not commit the violations. *Id.*

The evidence here tended to show that the cords and plugs in question were in an exposed area, open to inspection and in fact used by respondent's employees. It was further shown that respondent had instructed its employees to replace, as warranted, cords which it owned. Regardless of the ownership of the cords and plugs, respondent could have reasonably discovered and corrected the violation. Therefore, the Review Board's finding that respondent violated 29 CFR 1926.402(a)(4) is supported by the evidence.

Finally, we address respondent's contention that the court's order was arbitrary and capricious. In making such a determination, the "whole record" test is utilized. *High Rock Lake Assoc., supra.* A review of this record fails to reveal that the Review Board's actions were arbitrary and capricious. On the contrary, the Review Board's detailed findings and conclusions indicate a thoughtful consideration of the evidence. Respondent's assertion that the agency's decision was made to "make an example of Rebarco" is not supported by the record.

For the foregoing reasons, the trial court's order is affirmed.

Affirmed.

Judges EAGLES and ORR concur.

HUGH FRAZIER WILLIAMS, JR. v. JULIE HENDERSON WILLIAMS

No. 8825DC111

(Filed 4 October 1988)

1. Divorce and Alimony § 25.9 – child custody – change of prior order – sufficiency of evidence of changed circumstances

In a proceeding for a change in child custody where there were allegations that defendant's boyfriend, who later became her husband, had sexually

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abused the child, there was no merit to plaintiff's contention that the trial court, by ignoring the concerns reflected in prior custody orders restricting the boyfriend's presence around the child, exceeded its authority and issued an invalid order which placed custody with defendant for ten months of the year, since the prior orders were modifiable upon appropriate evidence of changed circumstances; the court found as changed circumstances defendant's marriage to her boyfriend and the child's recurring cases of vaginitis, which it concluded showed poor hygiene and supervision; and it found these circumstances sufficient to remove all restrictions imposed by prior orders on the boyfriend's presence around the child.

2. Divorce and Alimony § 25.9— child custody—sexual abuse alleged—failure to make findings about child's statements—no error

The trial court in a child custody proceeding did not err in failing to resolve whether or why statements were made by the child concerning painful sexual contact with a man named "Rod," the same name as that of defendant's boyfriend, since the trial court was not required to make findings of fact on every issue presented by the evidence, but was required to and did find enough material facts to support its judgment.

3. Evidence § 33; Divorce and Alimony § 25.9— change of child custody—sexual abuse of child—hearsay testimony not prejudicial

Because both parties in this child custody proceeding presented a considerable amount of conflicting evidence regarding alleged sexual abuse of the child, the admission of testimony that the Burke County Department of Social Services conducted an investigation and "unsubstantiated" the charges was not prejudicial, even if the testimony did have characteristics of hearsay.

4. Evidence § 33.2— child examined by psychiatrist—examinations not made in preparation for trial—testimony as to child's statements admissible

Where the parties' child was examined seven times by an expert in child psychiatry, statements made to the doctor by the child were admissible under the medical diagnosis and treatment exception to the hearsay rule where the record was insufficient to support defendant's contention that the examinations were conducted only for the purpose of trial. N.C.G.S. § 8C-1, Rule 803(4) (1986).

APPEAL by plaintiff from *Davis, Robert M., Sr., Judge*. Order entered 21 September 1987 in BURKE County District Court. Heard in the Court of Appeals 29 August 1988.

This appeal arises from an order granting custody of a minor child to defendant for ten months of each year. Plaintiff and defendant were married on 9 August 1980. Their child was born on 13 January 1984. The couple separated on 14 September 1985 and executed a separation agreement which gave them joint

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custody of the child. Defendant received an absolute divorce from plaintiff on 29 December 1986.

On 14 June 1986 plaintiff filed a complaint alleging that changed circumstances warranted placing custody in him; namely, defendant was cohabitating with a man named Rod Realon in the child's presence. The trial court (Judge Vernon presiding) entered an order on 14 June 1986 placing temporary custody in plaintiff. On 18 July 1986 Judge Green entered an interim order allowing overnight visitation with defendant with the stipulation that no male be present unless he was related to the child. On 17 October 1986 the trial court (Judge Vernon presiding) entered an order awarding custody to defendant and directing that no male not related to the child spend the night with the parent who had the child.

Plaintiff filed a motion on 10 November 1986 alleging that the child had been sexually abused. The trial court (Judge Kincaid presiding) awarded custody to plaintiff on 10 November 1986. Custody was returned to defendant on 24 November 1986 pursuant to Judge Vernon's order of 17 October 1986, but this order further directed that Realon have no contact with the child.

Defendant married Realon on 30 January 1987, and he moved into her residence, in violation of the 24 November 1986 order. The parties agreed for their motions regarding custody to be heard by a special out-of-district judge. On 21 September 1987, the trial court (Judge Davis presiding) awarded custody to plaintiff from 15 June until 15 August of each year, and to the defendant for the remaining time. It removed restrictions on Realon's presence around the child, finding, as a changed circumstance, his marriage to defendant. The trial court further found that the evidence was insufficient to show that the child had been sexually abused. At most, it concluded, the evidence indicated that she had vaginitis caused by poor hygiene.

Tharrington, Smith & Hargrove, by Roger W. Smith, Wade M. Smith, and Melissa H. Hill, for plaintiff-appellant.

Cecil Lee Porter for defendant-appellee.

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WELLS, Judge.

[1] Plaintiff contends that because the trial court ignored the concerns reflected in prior custody orders restricting Realon's presence around the child when it issued the order of 21 September 1987, it exceeded its authority and the order is not valid. We disagree. Although they provide guidance, prior custody orders are not binding in subsequent proceedings. Custody orders are not permanent, but remain freely modifiable upon appropriate evidence of changed circumstances. N.C. Gen. Stat. § 50-13.7 (1987); *Stanback v. Stanback*, 266 N.C. 72, 145 S.E. 2d 332 (1965); *Best v. Best*, 81 N.C. App. 337, 344 S.E. 2d 363 (1986).

The trial court found as changed circumstances defendant's marriage to Realon and the child's recurring cases of vaginitis, which it concluded showed poor hygiene and supervision. It found these circumstances sufficient to remove all restrictions imposed by prior orders on Realon's presence around the child, and awarded custody to defendant. Although these circumstances also might have led the court to award custody to plaintiff, given the evidence of possible sexual abuse, on appeal we cannot substitute our judgment for that of the trial court. In this discretionary matter, appellate review is confined to determining whether the trial court clearly abused its discretion. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). Evidence in the Record supports the court's finding that the child was never abused, so we cannot say that its decision to award custody to defendant and remove all restrictions on Realon was unsupported by reason. See *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980). These assignments are overruled.

[2] Plaintiff also assigns as error the trial court's failure to address his evidence of the child's numerous statements regarding painful contact with a man named "Rod." Plaintiff's evidence tended to show that the two-year-old child told plaintiff in early April and again in late April or early May of 1986 that "Rod hurt [her] bottom"; that on another occasion she made a cylindrical object with balls on the end and described it as "Rod's pee pee"; and that she complained on several other occasions to her father and to others, including a psychologist, about Rod having hurt her bottom, either with his finger, or with his "toy." The psychologist, Dr. Gallaway, concluded from his conversations with the child

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that she had been sexually abused. The court-appointed physician who examined the child testified, however, that she could have been coached to make the statements.

The trial court did not resolve the question of whether or why these statements were made, and we are concerned by the lack of factual findings on this issue. The trial court is not required, however, to make findings of fact on every issue presented by the evidence, *In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971), but is only required to find enough material facts to support its judgment. *Medlin v. Medlin*, 64 N.C. App. 600, 307 S.E. 2d 591 (1983). This assignment is overruled.

[3] A witness from the Burke County Department of Social Services testified that following an investigation into the alleged sexual abuse of the child, the Department "unsubstantiated" the charges. Plaintiff characterizes this testimony as inadmissible hearsay. While we agree that the testimony has characteristics of hearsay under the North Carolina Rules of Evidence, *see* N.C. Gen. Stat. § 8C-1, Rule 802 (1986), we hold that its admission was not prejudicial. "'The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative.'" *In re Peirce*, 53 N.C. App. 373, 281 S.E. 2d 198 (1981) (*quoting Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970)). Because both plaintiff and defendant presented a considerable amount of conflicting evidence regarding the alleged sexual abuse, we conclude that the admission of this testimony was not prejudicial. This assignment is overruled.

Pursuant to a court order the child was examined by Dr. Riddle, an expert in child psychiatry, on seven occasions between 14 January 1987 and 27 June 1987. He concluded that she was never abused.

[4] Plaintiff's final assignment of error concerns Dr. Riddle's testimony, in which he repeated statements made to him by the child during his examinations. Statements made for the purpose of medical diagnosis and treatment, because of their inherent reliability, are admissible under an exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(4) (1986); *State v. Oliver*, 85 N.C. App. 1, 354 S.E. 2d 527, *disc. rev. denied*, 320 N.C. 174, 358 S.E. 2d 65 (1987). Statements made to a physician in preparation for trial,

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however, are considered to be less reliable and are inadmissible hearsay. *State v. Stafford*, 317 N.C. 568, 346 S.E. 2d 463 (1986).

On direct examination Dr. Riddle stated that defendant took the child to him for purposes of "evaluation, diagnosis, if I came to any, and to provide whatever treatment that might be indicated." (Tp. 636.) Dr. Riddle testified on cross-examination that defendant also discussed the approaching trial with him. Although their conversation indicates some interest with the trial, the Record is insufficient to support plaintiff's contention that Dr. Riddle's examinations were conducted only for the purpose of trial. This assignment is overruled.

Allegations and evidence of child abuse require serious evaluation. The trial court's rather conclusory findings on this gravely important issue are troubling, but we cannot reverse its order simply because we might have reached a different result on conflicting evidence. *Best, supra*.

For the reasons stated, the order of the trial court is

Affirmed.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RANDOLPH FRYAR

No. 8810SC71

(Filed 4 October 1988)

1. Conspiracy § 5.1— evidence of participation of acquitted co-conspirator allowed — erroneous admission

In a prosecution of defendant for conspiring to traffic in more than 400 grams of cocaine, the trial court erred in admitting evidence of the participation of a previously acquitted individual in the alleged conspiracy.

2. Narcotics § 4.6— instructions on "knowing" possession of cocaine—no error

The trial court's instruction to the jury that if they found that defendant "knowingly possessed cocaine, and that the amount which [he] possessed was four hundred grams or more, it would be [their] duty to return a verdict of guilty of trafficking in cocaine" was not error, though the court failed to include the modifier "knowingly" in the second clause of the instruction, since

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the evidence showed that defendant carried over 900 grams of cocaine, and it was for the jury to decide whether this was a knowing possession.

3. Criminal Law § 7—undercover drug operation—instruction on entrapment not required

In a prosecution for conspiring to traffic in more than 400 grams of cocaine, possessing more than 400 grams of cocaine, and transporting more than 400 grams of cocaine where defendant was apprehended as the result of an undercover operation, defendant was not entitled to an instruction on entrapment.

APPEAL by defendant from *Read, J. Milton, Jr., Judge*. Judgment entered 4 September 1987 in WAKE County Superior Court. Heard in the Court of Appeals 6 September 1988.

Defendant was convicted in a jury trial of conspiring to traffic in more than 400 grams of cocaine, possessing more than 400 grams of cocaine, and transporting more than 400 grams of cocaine. He was sentenced to thirty-five years in prison.

At trial Detective James Ellerbe, of the Wake County Sheriff's Department, testified that he had met the defendant while working in an undercover operation to detect the sale of cocaine. He testified that the defendant, along with Claude Enoch and John Green, sold small quantities of cocaine to him on several occasions. On 3 March 1986, Ellerbe discussed purchasing one kilo of cocaine with the defendant and Green. Defendant flew to Philadelphia to obtain the cocaine, and Green instructed Ellerbe to bring \$42,000 to his apartment. Ellerbe, Green, and another undercover SBI agent went to the Raleigh-Durham Airport. Ellerbe testified that Enoch accompanied the defendant on the flight from Philadelphia, and that when he met Enoch inside the airport he told him that the defendant had the package. Defendant, Enoch, Green, and Ellerbe eventually got into an automobile outside the terminal. Defendant opened his suitcase and removed a package, whereupon SBI agents surrounded the automobile and arrested its occupants. The package was subsequently found to contain 990 grams of cocaine.

Enoch was tried before a jury and was found not guilty of trafficking or of conspiring to traffic in more than 400 grams of cocaine. Green was acquitted of trafficking in cocaine and was convicted of conspiracy to traffic in cocaine, but the conviction was vacated and remanded on appeal. *State v. Green* (filed in the

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COA 2 August 1988). Evidence pertaining to Enoch's involvement in the transactions was introduced at the defendant's trial, although he had already been acquitted. Counsel for the defendant attempted to introduce Enoch's acquittal but the trial court refused to admit this evidence.

Attorney General Lacy H. Thornburg, by Associate Attorney General Lorinzo L. Joyner, for the State.

John T. Hall for defendant-appellant.

WELLS, Judge.

[1] Defendant contends that the trial court erred in admitting evidence of the participation of a previously acquitted individual and refusing to admit evidence of his acquittal in the defendant's conspiracy trial. We agree that the trial court erred in admitting evidence detailing the acquitted individual's participation in the alleged conspiracy.

N.C. Gen. Stat. § 90-98 (1985) identifies the crime of conspiracy to commit an offense violating the North Carolina Controlled Substances Act. A criminal conspiracy is "an agreement between two or more people to do an unlawful act. . . ." *State v. Bell*, 311 N.C. 131, 316 S.E. 2d 611 (1984), *State v. Worthington*, 84 N.C. App. 150, 352 S.E. 2d 695, *petition for review denied*, 319 N.C. 677, 356 S.E. 2d 785 (1987). Because the crime requires more than one conspirator, a defendant cannot be convicted if his alleged co-conspirators were acquitted. *State v. Raper*, 204 N.C. 503, 168 S.E. 831 (1933).

Justice (later Chief Justice) Ruffin, writing for the North Carolina Supreme Court in *State v. Tom*, 13 N.C. 569 (December Term, 1828-1830), described the crime of conspiracy as "requiring the guilty cooperation of two, at least, to constitute it, in which there is a *mutual dependence of the guilt* of each person upon that of the other. . . ." (Emphasis added.) The essence of a conspiracy is the agreement with another to violate the law; when the alleged co-conspirator has been found not guilty of the crime there is no basis upon which to convict the remaining defendant. In the case at bar, Claude Enoch had been found not guilty of conspiracy to traffic in cocaine; therefore, his previous actions or statements relating to the alleged conspiracy could not be used to convict the defendant of conspiracy.

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[2] Defendant also assigns as error the trial court's instruction to the jury that if they found that "Randolph Fryar knowingly possessed cocaine, and that the amount which [he] possessed was four hundred grams or more, it would be [their] duty to return a verdict of guilty of trafficking in cocaine." Defendant contends that this instruction enabled the jury to find him guilty of trafficking at the highest level of punishment even if he did not know how much cocaine he possessed. We reject this contention; the evidence showed that he carried over 900 grams of cocaine and it was for the jury to decide whether this was a knowing possession. The trial court's failure to include the modifier "knowingly" in the second clause of the instruction was not error.

[3] In another argument, the defendant contends he was entitled to a jury instruction on entrapment. A defendant is entitled to the instruction when the defense is supported by the evidence, viewed in the light most favorable to the defendant. *State v. Jamerson*, 64 N.C. App. 301, 307 S.E. 2d 436 (1983). Defendant told Ellerbe prior to their discussing the kilo purchase that he was already "in business with some Colombians who could produce any amount of cocaine." The facts of this case do not show the degree of trickery or creation of the criminal design necessary to support the entrapment defense.

We likewise reject the defendant's assignments of error regarding the admission of the telephone bill for Fryar's Raleigh residence and the controlled substance itself. The record of long distance calls to Philadelphia was relevant to the proof of trafficking. The evidence relating to the packages of cocaine, furthermore, was sufficient to establish a clean chain of custody.

Defendant's contention that he was denied a speedy trial fails because his filing of the request for voluntary discovery tolled the running of N.C. Gen. Stat. § 15A-701 (1983 & Supp. 1987). See *State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984).

We do not reach the defendant's other assignments of error relating to his conspiracy conviction. We find no error with regard to his conviction for trafficking in cocaine by possessing and transporting over 400 grams of the substance, but because of the errors committed with regard to the conspiracy charge we hold that the defendant must receive a new trial on that charge.

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The result is:

As to the trafficking convictions, Nos. 86CRS21281 and 86CRS21282,

No error.

As to the conspiracy conviction, No. 87CRS15321,

New trial.

Chief Judge HEDRICK and Judge ARNOLD concur.

NANCY S. MACK v. DONALD T. MOORE, M.D., DONALD T. MOORE, M.D., P.A., ARTHUR VERNON STRINGER, M.D., JOHN T. DANIEL, JR., M.D., JOHN T. DANIEL, JR., M.D., P.A., LLOYD B. MINOR, M.D., AND J. D. SIEFKER, M.D.

No. 8714SC866

(Filed 4 October 1988)

1. Appeal and Error § 6.9; Rules of Civil Procedure § 26— order compelling response to discovery request—no sanctions imposed—order not appealable

An order compelling plaintiff to answer a discovery request was not immediately appealable, since it contained no enforcement sanction.

2. Rules of Civil Procedure § 26— non-testifying experts—identity not discoverable

The identities of experts who acquired knowledge of facts and formed opinions in anticipation of litigation or for trial but who are not expected to testify at trial are not discoverable under Rule 26. N.C.G.S. § 1A-1, Rule 26(b)(4)(a)(1) (1983).

3. Rules of Civil Procedure § 26— request for identity of all experts—procedure for determining discoverability

Before it can be determined if the identity of an expert is discoverable, the party resisting discovery should set forth with some specificity the reasons he believes the expert's identity is not discoverable; the propounding party is then entitled to a determination of the expert's status based on an *in camera* review by the trial court; the court is then required to consider whether the expert has information of discoverable matter, how the expert acquired the information, and whether the party expects to call the expert as a witness; and after the *in camera* review the trial court should make appropriate findings of fact and then order the evidence taken during the *in camera* review sealed in the files of the clerk of court for use on appellate review.

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APPEAL by plaintiff from *Lee (Thomas H.), Judge*. Order entered 19 May 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 February 1988.

R. Marie Sides and Chris Kremer for plaintiff-appellant.

Faison, Brown, Fletcher & Brough, by O. William Faison and Reginald B. Gillespie, Jr., for defendant-appellees Donald T. Moore, M.D., and Donald T. Moore, M.D., P.A.

Yates, Fleishman, McLamb & Weyher, by Beth R. Fleishman, for defendant-appellees Arthur Vernon Stringer, M.D., Lloyd B. Minor, M.D., and J. D. Siefker, M.D.

GREENE, Judge.

Plaintiff Nancy S. Mack (hereinafter "Plaintiff") appeals from the trial court's order compelling her to answer certain discovery requests propounded by Defendants Donald T. Moore, M.D. and Donald T. Moore, M.D., P.A. (hereinafter "Defendants"). For the reasons below, we reverse the trial court's order.

Plaintiff filed a complaint against defendants alleging she was injured as a result of negligence and medical malpractice. Defendants served a set of Interrogatories and a Request for Production of Documents on Plaintiff. Included among these was Interrogatory 46, which asked:

Have you, your attorney, or agents consulted or communicated in any way with any consultant, advisor, or any other individual or group of individuals whom you could or might use as an expert witness, but whom you do not intend to call as a witness. If affirmative, identify the name, present address and occupation of each such individual and produce for inspection any and all reports, evaluations or other documents prepared by each such individual.

Plaintiff answered Interrogatory 46 as follows: "NOT WITHIN THE scope of Rule discovery."

Defendants thereafter sought, pursuant to N.C.G.S. Sec. 1A-1, Rule 26, to compel plaintiff to respond to Interrogatory 46. The trial court granted the motion and ordered the plaintiff to answer Interrogatory 46.

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There are two questions presented for review: I) whether the trial court's order compelling discovery is immediately appealable and II) whether the identities of experts not expected to testify at trial are discoverable under Rule 26 of the North Carolina Rules of Civil Procedure.

I

[1] As a general rule, an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment. *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E. 2d 806, 807, *disc. rev. denied*, 318 N.C. 505, 349 S.E. 2d 859 (1986). However, when a party is "adjudged to be in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions," the order is immediately appealable because "it affects a substantial right." *Benfield v. Benfield*, 89 N.C. App. 415, 418, 366 S.E. 2d 500, 502 (1988).

Here, the order compelling plaintiff to answer the discovery request contained no enforcement sanctions and therefore is not appealable. Nevertheless, we have elected in our discretion to treat the purported appeal as a petition for writ of certiorari and address the merits. N.C.R. App. P. 21(a)(1), N.C.G.S. Sec. 7A-32(c) (1986). See *Industrotech Constructors v. Duke University*, 67 N.C. App. 741, 742-43, 314 S.E. 2d 272, 274 (1984).

II

[2] The issue presented by the plaintiff's assignment of error is whether the plaintiff can be required to provide to defendant the identity of her non-testifying expert.

Rule 26(b)(4)(a)(1) provides:

(4) Trial preparation; Experts.—Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

a. 1. A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state

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the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

N.C.G.S. Sec. 1A-1, Rule 26(b)(4)(a)(1) (1983).

This statute permits a party to obtain by interrogatories from another party three things: "(1) the identity of any expert witness the other party expects to call at trial; (2) the subject matter on which the expert is expected to testify; and (3) the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion," 8 C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 2030, p. 252 (discussing Federal Rule 26(b)(4)(A)(i) which is identical to North Carolina Rule 26(b)(4)(a)(1)), provided the "facts known and opinions held" by the expert are "discoverable under the provisions of subsection (b)(1)" and the "facts known and opinions held" were "acquired or developed in anticipation of litigation." If discovery is desired under Rule 26(b)(4) beyond that permitted under Rule 26(b)(4)(a)(1), the party may seek an order from the court for "further discovery" as permitted under Rule 26(b)(4)(a)(2).

Neither North Carolina Rule 26(b)(4) nor its federal counterpart speaks specifically to the issue of whether a party is entitled to discover the *identity* of a non-testifying expert. The federal version of Rule 26(b)(4) however does provide:

A party may discover facts known or opinions held by an *expert* who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and *who is not expected to be called as a witness* at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Federal Rule 26(b)(4)(B) (emphasis added).

There is disagreement among the courts as to whether a party is entitled under the federal rules to discover the identity of a non-testifying expert. Compare *Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F. 2d 496 (10th Cir. 1980) (requiring proof of "exceptional circumstances" before en-

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titlement to identity of non-testifying expert) with *Baki v. B. F. Diamond Const. Co.*, 71 F.R.D. 179 (D. Md. 1976) (allowing discovery of identity of non-testifying expert under showing of relevance as provided in Rule 26(b)(1)).

The North Carolina version of Rule 26 does not contain a provision similar to Federal Rule 26(b)(4)(B) and does not otherwise specifically address the discoverability of the identities of non-testifying experts.

The defendant here argues that the general provisions of Rule 26(b)(1) require the production of the identities of all experts whether or not the expert is going to testify and regardless of how or when the expert acquired knowledge of the discoverable matter. Rule 26(b)(1) provides in part:

Parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action . . . including . . . the *identity* and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it ground for objection that the examining party has knowledge of the information as to which discovery is sought.

N.C.G.S. Sec. 1A-1, Rule 26(b)(1) (1983) (emphasis added).

The defendant argues the identity of an expert is discoverable if "not privileged," "relevant" and it "appears reasonably calculated to lead to the discovery of admissible evidence" and the expert has knowledge of some "discoverable matter." Rule 26(b)(1).

We reject defendant's argument. Rule 26(b)(1) addresses the scope of discovery in general and should be read as determinative only when more specific directives are not provided. Rule 26(b)(4) provides specific directives for discovering information held by some experts and to the extent applicable, Rule 26(b)(4) is controlling. See *State v. Strickland*, 27 N.C. App. 40, 43, 217 S.E. 2d 758, 760, *appeal dismissed*, 288 N.C. 512, 219 S.E. 2d 348 (1975) (recognized principle of statutory construction is that words of particular import following words of general import will prevail).

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If an expert (1) has facts and opinions "otherwise discoverable" under Rule 26(b)(1), (2) "acquired or developed [such facts and opinions] in anticipation of litigation or for trial," and (3) is expected to be called as an expert witness at trial, Rule 26(b)(4) is controlling and his identity is discoverable. If such an expert is not expected to testify, the identity of that expert is not discoverable. The identities of experts whose information is not acquired in anticipation of trial, such as actors or viewers of the occurrence that gave rise to the suit, are discoverable as ordinary non-expert witnesses. *See Rule 26, comment; see also 4 Moore's Federal Practice Sec. 26.66[2] at 26-408 (2d ed. 1987)* ("Experts who have not acquired or developed their information in anticipation of litigation or for trial are not protected by Rule 26(b)(4), but instead are treated as ordinary witnesses under Rule 26(b)(1)"). We do not here address, as the issue is not raised in this appeal, whether a party may obtain discovery pursuant to Rule 26(b)(3) of "documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant. . . ." *See generally Rule 26, comment* (failure to adopt Federal Rule 26(b)(4)(B) would not appear to foreclose discovery under North Carolina Rule 26(b)(3)); *4 Moore's Federal Practice Sec. 26.64[3-1] at 26-362 (2d ed. 1987)* (party seeking discovery of documents and materials must show substantial need or inability to obtain substantially equivalent materials without undue hardship).

[3] Before it can be determined if the identity of an expert is discoverable, the party resisting discovery should set forth with some specificity the reasons he believes the expert's identity is not discoverable. The propounding party is then entitled to a determination of the expert's status based on an *in camera* review by the trial court. *See State v. Hardy*, 293 N.C. 105, 128, 235 S.E. 2d 828, 842 (1977). This necessarily requires the trial court to consider whether the expert has information of discoverable matter, how the expert acquired the information, and whether the party expects to call the expert as a witness. After the *in camera* review, the trial court should make appropriate findings of fact and then order the evidence taken during the *in camera* review sealed in the files of the clerk of court for use on appellate review. *Id. See also State v. Chavis*, 24 N.C. App. 148, 182, 210

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S.E. 2d 555, 577 (1974). Here the record does not reflect any findings of fact by the trial court nor is there anything in the record to indicate that the trial court conducted an *in camera* review. Therefore, the order of the trial court must be vacated and the case remanded for proceedings consistent with this opinion.

Vacated and remanded.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. IRVIN BARNES

No. 887SC104

(Filed 4 October 1988)

1. Burglary and Unlawful Breakings § 5.3— acting in concert to “rough up” victim—burglary committed in furtherance of assault—sufficiency of evidence

There was sufficient evidence as to defendant's presence and a common plan or purpose to submit the charge of burglary to the jury under the theory of acting in concert where the evidence tended to show that defendant and three others went to the home of the victim to “rough up” her and her boyfriend; two of defendant's accomplices broke into the victim's house by kicking in the door; and defendant remained five or six yards from the house or down the road, but close enough to apprehend the boyfriend who fled from the house immediately after the burglary.

2. Criminal Law § 113.7— acting in concert—presence of defendant at crime scene—instructions not prejudicial

The trial court's alleged failure properly to instruct the jury that defendant must have been present at the time of the crimes in order to be guilty under the doctrine of acting in concert did not amount to plain error since defendant was actually or constructively present when all of the crimes were committed, and the alleged error had no probable impact on the jury's verdict.

3. Burglary and Unlawful Breakings § 8; Rape § 7— first degree burglary and statutory rape—concurrent life sentences imposed—error in instructing on statutory rape harmless

Where defendant received a life sentence for statutory rape which was to run concurrently with a life sentence imposed for burglary, any error of the trial court in instructing with regard to statutory rape was harmless error.

4. Criminal Law § 99.6— court's remarks to witness—no error

There was no merit to defendant's contention that the trial court violated defendant's due process right to a fair trial by interrupting the testimony of a

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witness and addressing remarks to the witness and his counsel, since all of the court's comments were made out of the hearing of the jury and therefore could not have invaded the jury's province of determining credibility; the judge never threatened or accused the witness in any way, and the witness continued to testify in much the same way as before the judge's comments; defendant's attorney was able to elicit essential testimony from the witness; and there was nothing in the record which questioned the impartiality of the judge.

5. Criminal Law § 113.6 – two defendants – jury instructions – use of “and/or” – no prejudice

Defendant who was tried with an accomplice was not prejudiced by the trial court's use of "and/or" in the jury instructions since the trial court explained in the preliminary instructions before trial and in the instructions at the close of the evidence that defendants must be judged "completely separately and absolutely independently" from each other; "and/or" was only used to delineate the elements of each crime; and the jury was not misled because defendant and his accomplice were convicted of different crimes.

APPEAL by defendant from Stevens (*Henry L., III*), Judge.
Judgment entered 11 September 1987 in Superior Court, WILSON County. Heard in the Court of Appeals 1 June 1988.

On 7 September 1987, defendant and Willie Ray Ruffin were joined for trial and tried by a jury on seven bills of indictment. Each defendant was charged with first-degree burglary, statutory rape, robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, first-degree rape and first-degree sexual offense. On jury verdicts of guilty, the court entered judgments and imposed sentences on defendant as follows: (1) first-degree burglary—life imprisonment; (2) statutory rape—life imprisonment to run concurrently with the life sentence for burglary; (3) robbery with a dangerous weapon—twelve years imprisonment; (4) two counts of assault with a deadly weapon inflicting serious injury—three years imprisonment for each. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Lee, Reece & Weaver, by W. Earl Taylor, Jr., for defendant appellant.

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ORR, Judge.

I.

[1] Defendant first assigns as error the trial court's allowing the jury to consider a charge of burglary based on the acting in concert principle. Defendant contends that the State failed to present evidence showing that defendant was present at the scene of the burglary or that the burglary was pursuant to a common plan.

Evidence presented at trial relevant to this issue is as follows: On 5 January 1987, defendant's uncle, Plummer Ruffin, agreed to pay defendant and three other men, Eric Blount, Willie Ruffin, and David Howard, \$100 each to go to the home of Plummer's former girlfriend, Rosa Lee Epps, and "rough her up." Plummer further instructed them to "rough up" Epps' boyfriend, William Roberson, "if he got in the way." Plummer then drove the men to a bridge near Epps' home and armed each man with a metal pipe.

At approximately 7:30 p.m., Howard and Blount approached Epps' house. Defendant and Willie Ruffin stayed back so that the four men would not be seen together. Howard and Blount spoke to Roberson who was inside the house. They asked to use the telephone, the bathroom and the car in an attempt to get inside the house. Roberson denied all of their requests. Howard and Blount walked away from the house, and then decided to go back and "bust the door open." Howard kicked the door in and he and Blount immediately began assaulting Roberson and Epps. Roberson escaped, but was caught by defendant and Willie Ruffin who were waiting outside. It was unclear from testimony at trial whether defendant was waiting "down the road" or only "five or six yards" from the house. In either case, defendant shot a gun into the air, ordered Roberson to stop and, along with Willie Ruffin, took Roberson back into the house.

"The elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) with the intent to commit a felony (5) into a dwelling house . . . (6) which is actually occupied at the time of the offense. *State v. Accor [and State v. Moore]*, 277 N.C. 65, 175 S.E. 2d 583 (1970); G.S. 14-51." *State v. Davis*, 282 N.C. 107, 116, 191 S.E. 2d 664, 670 (1972).

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In North Carolina, one may be convicted of a crime under the "acting in concert" principle if "he is present at the scene of the crime and . . . he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979).

We find defendant's contention that the State failed to provide evidence establishing that the burglary was part of a common plan to be without merit. The Supreme Court of North Carolina found no error in a jury instruction which stated that if

'two persons join in a purpose to commit a crime, each of them, if *actually or constructively present*, is not only guilty as a principal if the other commits that particular crime, but *he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.*'

State v. Westbrook, 279 N.C. 18, 41-42, 181 S.E. 2d 572, 586 (1971) (emphasis added).

The plan to "rough up" Rosa Epps required either gaining entry into her house or persuading her to come outside. Clearly, breaking into her home was in pursuance of the common purpose to assault her.

We also find defendant's contention that there was no evidence of his presence at the scene of the burglary to be without merit. The presence required for acting in concert is either actual or constructive. *Id. See also State v. Ruffin*, 90 N.C. App. 705, 370 S.E. 2d 279 (1988). In defining constructive presence, this Court has held that actual distance is not determinative, but that "the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime." *State v. Buie*, 26 N.C. App. 151, 153, 215 S.E. 2d 401, 403 (1975). In *State v. Chastain*, 104 N.C. 900, 10 S.E. 519 (1889), our Supreme Court upheld a jury instruction which stated that the defendant who was one hundred and fifty yards from the actual assault was present if he was there with a gun to lend aid if needed.

This case is factually similar to *Chastain*. The State's evidence tends to show that defendant was waiting with a gun

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either five or six yards from the house or down the road, but close enough to lend aid by apprehending William Roberson who fled from the house immediately after the burglary.

We hold that there was sufficient evidence as to defendant's presence and a common plan or purpose to submit the charge of burglary to the jury under the theory of acting in concert.

II.

[2] Defendant next assigns as error the trial court's failure to properly instruct the jury that defendant must have been present at the time of the crimes in order to be guilty under that doctrine.

Defendant failed to object to this instruction at trial. Consequently, for the instruction to be the basis of a reversal, it must rise to the level of "plain error." "Plain error" exists "where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E. 2d 375, 378 (1983) (emphasis supplied), quoting, *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982). In considering "plain error," "the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E. 2d at 379.

As discussed earlier, one may be convicted under the principle of acting in concert if one is present, actually or constructively, at the scene of the crime, and the crime was committed pursuant to a common plan or purpose. *State v. Westbrook*, 279 N.C. at 41-42, 181 S.E. 2d at 586. See also *State v. Joyner*, 297 N.C. at 357, 255 S.E. 2d at 395.

Defendant was actually present in the house when all of the crimes were committed, with the exception of burglary. The State's evidence, even when viewed in defendant's favor, demonstrates his constructive presence at the scene of the burglary. Since defendant was indeed present or constructively present when all of the crimes were committed, we can find no compelling basis for a belief that an instructional error with regard to presence had a probable impact on the jury's verdict. We hold that there was no "plain error" in this instruction.

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III.

[3] Next, defendant assigns as reversible error the trial court's denial of defendant's motion to dismiss the charge of statutory rape. Defendant argues that the State failed to prove every element of the crime because the State did not offer any evidence of defendant's age.

An essential element of the crime of statutory rape is that the defendant must be at least twelve years of age and at least four years older than the victim. N.C.G.S. § 14-27.2(a)(1) (1986).

Defendant questions the constitutionality of North Carolina decisions which allow jurors to determine a defendant's age based on their observation of the defendant. See *State v. Evans*, 298 N.C. 263, 258 S.E. 2d 354 (1979); *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. McNair*, 93 N.C. 628 (1885).

We need not address the constitutional issues raised here in order to decide this case. "It is well settled that where concurrent sentences are imposed on counts of equal gravity, or concurrent sentences of equal length are imposed, any error in the charge relating to one count only is harmless." *State v. Evans*, 298 N.C. at 267, 258 S.E. 2d at 357. Here defendant received a life sentence for statutory rape which will run concurrently with the life sentence imposed for burglary. Therefore, any error on the part of the trial court regarding statutory rape was harmless error and is not grounds for reversal.

IV.

[4] Defendant further contends that the trial court violated his due process right to a fair trial by interrupting the testimony of a witness and addressing remarks to the witness and his counsel. Defendant cites *State v. Rhodes*, 290 N.C. 16, 224 S.E. 2d 631 (1976), to support his contention that special hazards are created by judicial warnings and admonitions to a witness in a criminal trial.

Rhodes sets out four hazards which may result from judicial warnings and admonitions to a witness. First, the trial judge may invade the province of the jury by assessing the witness's credibility. *Id.* at 24, 224 S.E. 2d at 636. Second, a witness may change the testimony due to a judge's threat of prosecution for

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perjury. *Id.* Third, defendant's attorney may be intimidated or discouraged from eliciting essential testimony from the witness. *Id.* at 26, 224 S.E. 2d at 637. Fourth, a judge's comments may reveal a violation of defendant's due process right to trial before an impartial judge. *Id.* at 27, 224 S.E. 2d at 638.

In *Rhodes*, the trial judge warned the witness (defendant's wife) and defendant's attorney regarding perjury. The judge stated that the witness was treading on thin ice, that he questioned the truthfulness of her statements and that he would not tolerate perjury. The Supreme Court found these remarks to be "extensive, accusatory, and threatening." *State v. Rhodes*, 290 N.C. at 28, 224 S.E. 2d at 639. The Court also found that these remarks prevented the defense attorney from questioning the witness further for fear of offering what the trial court believed to be perjured testimony.

In the case at bar, the trial court only interrupted the witness in response to defendant's objection to the district attorney's leading questions on direct examination. After sending the jury out of the courtroom, the judge found pursuant to N.C.G.S. § 8C-1, Rule 611(c) that State's witness David Howard was a hostile witness and that the State could employ leading questions. The trial judge did question the manner of the testimony, but never questioned the truthfulness of the testimony. He stated that the testimony was different from other testimony given by the same person concerning the same series of events and that the witness seemed reluctant to respond to questioning.

We cannot find any reason to suspect that the *Rhodes* hazards materialized in this case. All of the comments were made out of the hearing of the jury, and therefore could not have invaded the jury's province of determining credibility. The judge never threatened or accused the witness in any way, and the witness continued to testify in much the same way as before the judge's comments. Defendant's attorney was able to elicit essential testimony from the witness even getting the witness to agree that in repeatedly contradicting himself, he was "just like a feather twisting in the wind." Finally, neither in these comments, nor in any other instance in the record is there evidence which questions the impartiality of the trial judge.

We can find no prejudice to defendant; therefore, no error.

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V.

[5] Defendant next assigns as error the use of the language "and/or" in the jury instructions in that such language is ambiguous and confusing. Defendant contends that the jury may have been misled by the instruction to believe that it should convict all if one is found to be guilty. Again, defendant failed to object to the instructions. Accordingly, if the trial court committed an error, it must rise to the level of "plain error" to warrant a favorable ruling for defendant.

In a case where co-defendants are tried jointly, jury instructions which can be construed to mean that if one is convicted the other should be convicted as well, will constitute reversible error. *State v. Tomblin*, 276 N.C. 273, 276, 171 S.E. 2d 901, 903 (1970). However, in reviewing a charge, it "must be construed 'as a whole in the same connected way in which it was given.' When thus considered, if it 'fairly and correctly presents the law, it will afford no ground for reversing the judgment' " *Id.* at 276, 171 S.E. 2d at 903, quoting, *State v. Valley*, 187 N.C. 571, 572, 122 S.E. 373, 373-74 (1924).

The question then becomes did the use of "and/or" when viewed in the context of the entire charge mislead the jury? We find that it did not.

In the preliminary instructions before trial and in the instructions at the close of the evidence, the trial court explained that the defendants must be judged "completely separately and absolutely independently" from each other. "And/or" was only used to delineate the elements of each crime. After setting out the elements, the trial court additionally charged the jury without using "and/or" regarding what it must find to convict each defendant of each crime.

Finally, the jury does not appear to have been misled. Co-defendant Ruffin was found not guilty of the two rape charges, the first-degree sex offense, and the charge of robbery. Of these crimes, defendant Barnes was found guilty of statutory rape and robbery with a dangerous weapon. If the jury had been misled to believe that if one was convicted the other must be convicted, it would have found both defendants guilty of identical crimes.

For the reasons stated above, we find defendant received a fair trial free from prejudicial error.

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No error.

Judges EAGLES and SMITH concur.

ROBERT F. CATOE, SR. v. HELMS CONSTRUCTION & CONCRETE CO., A NORTH CAROLINA PARTNERSHIP, GARY W. MYERS, AN INDIVIDUAL, AND CONNIE HELMS MYERS, AN INDIVIDUAL

No. 8826SC88

(Filed 4 October 1988)

1. Contracts § 27.3— insufficiency of evidence of lost profits

Plaintiff, who allegedly agreed to provide cost estimates, supervision, equipment, and laborers on concrete construction jobs to be performed by defendant, failed to establish an essential element of his case, the amount of damages for lost profits, and the trial judge was therefore correct as a matter of law in peremptorily instructing the jury that no more than nominal damages could be awarded on plaintiff's breach of express contract claim where there was no evidence showing the actual costs incurred in each of the seven jobs in question; evidence of proceeds, but not profits, was presented for only three of the seven jobs; plaintiff alleged that defendant failed to produce certain documentary evidence subpoenaed by plaintiff, but plaintiff sought no sanctions and failed to call defendant as an adverse witness; plaintiff's estimates of both the costs and proceeds for most of the jobs did not provide a sufficient basis for the jury to determine lost profits; and when a *prima facie* case of breach of contract is made out, but there is not evidence upon which a jury could base a damage award, the injured party is still entitled to nominal damages.

2. Quasi Contracts and Restitution § 2— express contract found — quantum meruit claim not considered—no error

The trial court did not err in instructing that, if the jury found an express contract between the parties providing that plaintiff would furnish expertise, supervision, equipment and laborers on concrete construction jobs to be performed by defendant, it could not consider plaintiff's quantum meruit claim for expenses incurred in furnishing materials and equipment and paying laborers' wages, since a party may not recover for both a breach of an express contract and for quantum meruit based on the same subject matter.

APPEAL by plaintiff from *Frank W. Snepp, Judge*. Judgment entered 20 August 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 August 1988.

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Winfred R. Ervin, Jr., for plaintiff-appellant.

William D. McNaull, Jr., for Gary W. Myers, defendant-appellee.

Connie Helms Myers, pro se.

BECTON, Judge.

Plaintiff, Robert Catoe, brought this action seeking \$26,988.85 in damages (\$24,000 for lost profits and \$2,988.85 for out-of-pocket expenses) for breach of an express contract, or, in the alternative, recovery in the same amount in *quantum meruit*. Catoe appeals from judgment entered on a jury verdict awarding him nominal damages, assigning as error certain peremptory instructions to the jury. We find no error in the instructions and affirm the judgment.

I

Plaintiff Catoe alleged in his Complaint that he entered into an agreement with defendant Helms Construction & Concrete Company (Helms Construction), a partnership owned by defendants Gary Myers and Connie Helms Myers. Under the terms of the alleged agreement, Catoe was to provide (1) his expertise in preparing cost estimates on concrete construction jobs to be performed by Helms Construction, and (2) supervision, equipment, and laborers on the jobs as needed. In exchange, Catoe was to receive 50% of the profits earned on each job and reimbursement for expenses incurred.

The only evidence offered at trial of an agreement between the parties was a copy of a written contract. The contract, typed on a pre-printed form entitled "Proposal, Helms Construction Co." consisted of the following typewritten words:

I Gary Myers manager of Helms Construction Co. agree to work with R. F. Catoe, Sr. to sell and estimate jobs for my company. I agree to split any profit on each job at 50%-50% split.

The contract, dated November 12, 1983, was signed by Gary Myers and by Catoe. Catoe produced no evidence of an oral or written agreement regarding reimbursement of expenses.

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At trial, Catoe's evidence tended to show the following. Pursuant to the agreement, Catoe prepared estimates for defendants of the cost of seven concrete construction jobs and recommended a contract price for each. When work on these jobs began, Catoe paid wages to some of the laborers, and supplied certain materials and equipment. Catoe testified that he incurred out-of-pocket expenses on these jobs ranging from \$3,094.25 to \$3,294.25. Catoe offered no evidence of the actual profits earned by defendants on any of the jobs.

Defendant Gary Myers did not testify on his own behalf, nor was he called as an adverse witness by Catoe.

The issues submitted to the jury were framed in the alternative, as were the allegations in the Complaint. The trial judge peremptorily instructed the jury that it could reach Catoe's implied contract claim only if it found no express contract between the parties:

. . . [I]f you have answered Issue Number 1 no, that is you do not find an expressed [sic] contract, then you will . . . consider Issue Number 5: Did the Plaintiff, Robert F. Catoe, pay for labor and materials to the Defendant, Helms Construction & Concrete Company, pursuant to an implied contract? . . . [I]f you find that there is an expressed [sic] contract . . . then there can be no recovery on any implied contract.

The judge further instructed the jury as to the amount of damages recoverable for breach of express contract:

. . . I instruct you that there is no evidence before you as to the profit on any of the construction jobs which have been mentioned in the testimony. Therefore, in this case I instruct you that if you . . . find that Mr. Catoe did render services to Helms Construction Company pursuant to the terms of this expressed [sic] contract, it being admitted that he has not been paid for any services, then you will answer this issue in some nominal amount, such as One Dollar. I instruct you that the Plaintiff, under the evidence of this case, is not entitled to recover more than nominal damages on this issue.

The jury answered the issues relevant to this appeal as follows:

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1. Did the Plaintiff, Robert F. Catoe, enter into an express contract with the Defendant, Helms Construction & Concrete Company, as alleged in the Complaint?

ANSWER: Yes.

2. If so, what amount of damages is the Plaintiff, Robert F. Catoe, entitled to recover from the Defendant, Helms Construction & Concrete Company, for the breach of said express contract?

ANSWER: \$1.00.

...

5. Did the Plaintiff, Robert F. Catoe, pay for labor and materials to the Defendant, Helms Construction & Concrete Company, pursuant to an implied contract?

ANSWER: No answer.

6. If so, what amount is the Plaintiff, Robert F. Catoe, entitled to recover from the Defendant, Helms Construction & Concrete Company, for breach of said implied express contract?

ANSWER: No answer.

Catoe's assignments of error to the peremptory instructions will be addressed in order.

II

[1] Catoe first argues that he presented sufficient evidence of lost profits to have been considered by the jury and, thus, that the trial judge erred in peremptorily instructing the jury to award only nominal damages for breach of express contract. We agree with the trial judge that Catoe failed to present sufficient evidence of lost profits, and we conclude that the peremptory instructions were proper.

A

The measure of damages for breach of express contract is an amount which reasonably may have been contemplated by the parties when they entered into the contract, or which will compensate the injured party as if the contract had been fulfilled.

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Weyerhaeuser Co. v. Supply Co., 292 N.C. 557, 560-61, 234 S.E. 2d 605, 607 (1977). Lost profits may be recovered only when they "can be ascertained and measured with reasonable certainty." *Gouger & Veno, Inc. v. Diamondhead Corp.*, 29 N.C. App. 366, 368, 224 S.E. 2d 278, 279 (1976). A party must present evidence, not mere speculation, to recover lost profits. *Meares v. Nixon Construction Co.*, 7 N.C. App. 614, 623, 173 S.E. 2d 593, 599 (1970). Actual costs are subtracted from the proceeds of a transaction to calculate lost profits. See *Industrial & Textile Piping, Inc. v. Industrial Rigging Services, Inc.*, 69 N.C. App. 511, 515, 317 S.E. 2d 47, 50 (1984), *disc. rev. denied*, 312 N.C. 83, 321 S.E. 2d 895 (1984).

Our review of the record reveals no evidence from which Catoe's lost profits could be determined in the first instance, let alone "with reasonable certainty." Evidence introduced at trial of the proceeds defendants received on the construction jobs was at best incomplete, with evidence of proceeds (not profits) presented for only three of the seven jobs. The record is completely devoid of evidence showing the actual costs incurred in each job.

In his brief, Catoe explains that the absence of such evidence at trial is due to defendant Gary Myers' failure to produce certain documentary evidence subpoenaed by Catoe. The record reveals that no sanctions against Mr. Myers for this alleged failure were sought or imposed, and that Catoe failed to call Myers as an adverse witness to directly elicit this information on the stand.

B

Although Catoe offered no evidence at trial of the actual costs of each job, he did offer his estimates of both the costs and proceeds for most—but not all—of the construction jobs. Catoe contends on appeal that these estimates provide a sufficient basis for the jury to determine lost profits. We disagree. In *Meares v. Nixon Construction Co.*, this court held that an estimate of anticipated profits does not provide an adequate factual basis for a jury to ascertain the measure of damages. 7 N.C. App. at 622, 173 S.E. 2d at 600. In our view, Catoe merely speculated as to the precise costs incurred and profits earned.

C

When a *prima facie* case of breach of contract is made out, but there is no evidence upon which a jury could base a damage

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award, the injured party is still entitled to nominal damages for invasion of his legal rights. *Robbins v. C. W. Myers Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E. 2d 884, 886 (1960); *Cole v. Sorie*, 41 N.C. App. 485, 490, 255 S.E. 2d 271, 274 (1979), *disc. rev. denied*, 298 N.C. 294, 259 S.E. 2d 911 (1979). It is not error to limit recovery to nominal damages when evidence is insufficient for the jury to determine lost profits with reasonable certainty. *Gouger & Veno*, 29 N.C. App. at 369, 224 S.E. 2d at 280.

A peremptory instruction to the jury is proper when all evidence points in the same direction with but a single inference to be drawn as a matter of law. *Myers v. Myers*, 68 N.C. App. 177, 181, 314 S.E. 2d 809, 813 (1984). See Phillips, *McIntosh North Carolina Practice and Procedure* Sec. 1516 (Supp. 1970). We conclude that Catoe failed to establish an essential element of his case, the amount of damages for lost profits, and that, as a result, the trial judge was correct as a matter of law in peremptorily instructing the jury that no more than nominal damages could be awarded on the express contract claim.

III

[2] Catoe next argues that the issue of reimbursement of out-of-pocket expenses was not addressed by the parties' written agreement. He assigns error to the trial court's instruction that, if the jury found an express contract between the parties, it could not consider Catoe's *quantum meruit* claim for expenses incurred in furnishing materials, equipment, and paying laborers' wages.

A

It is well established that in the absence of an express contract, a plaintiff may recover in *quantum meruit* on an implied contract theory for the reasonable value of services and materials rendered to and accepted by a defendant. *Ellis Jones, Inc. v. Western Waterproofing Co., Inc.*, 66 N.C. App. 641, 647, 312 S.E. 2d 215, 218 (1984); see *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 271, 162 S.E. 2d 507, 512 (1968). It is equally well-settled in North Carolina that there can be no recovery for breach of implied contract when an express contract covers the same subject matter. *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E. 2d 905, 908 (1962); *Industrial & Textile Piping*, 69 N.C. App. at 515, 317 S.E. 2d at 50; *Beckham v. Klein*, 59 N.C.

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App. 52, 58, 295 S.E. 2d 504, 508 (1982). "It is only when parties do not expressly agree that the law interposes and raises an implied promise." *Vetco Concrete*, 256 N.C. at 713, 124 S.E. 2d at 908 (citations omitted); *Keith v. Day*, 81 N.C. App. 185, 198, 343 S.E. 2d 562, 570 (1986), *rev. dismissed*, 320 N.C. 629, 359 S.E. 2d 466 (1987) (citations omitted).

Liberal pleading rules permit pleading in the alternative. See N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 8 (Supp. 1987); *Hall v. Mabe*, 77 N.C. App. 758, 760, 336 S.E. 2d 427, 429 (1985). However, it is not necessary to plead *quantum meruit* "in the alternative" unless the claim is based on the same subject matter as the express contract claim, since one cannot recover on both claims. See *Keith*, 81 N.C. App. at 199, 343 S.E. 2d at 571. Consequently, it is error to submit an alternative implied contract claim to the jury when an express contract has been proved. See *id.*; *Vetco Concrete*, 256 N.C. at 715, 124 S.E. 2d at 909.

Catoe argues that the express contract and *quantum meruit* claim for reimbursement of expenses are not the same subject matter. This argument is untenable in light of Catoe's pleadings and evidence. In Counts I to VII of the Complaint, Catoe pled breach of express contract seeking damages for lost profits and various out-of-pocket expenses. In Count VIII, captioned "*Quantum Meruit*," Catoe incorporated by reference Counts I to VII, seeking recovery for the same services and resources he provided to defendants pursuant to the alleged express contract. Only on appeal does Catoe separate his implied contract claim for expenses from his implied contract claim for lost profits.

Catoe grounded his entire claim for \$26,988.85—which includes a demand for reimbursement of expenses—on an express contract. In the event that he could not prove an express contract, Catoe sought the same amount in the alternative in *quantum meruit*. Catoe succeeded in proving the existence of an express contract at trial. He cannot now successfully assert on appeal that his implied contract claim should have been considered by the jury simply because his express contract claim yielded only nominal damages.

B

Finally, Catoe failed to demonstrate whether reimbursement of expenses was—or was not—to be covered by the written con-

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tract introduced at trial. No evidence of a separate oral or written agreement regarding reimbursement was produced. Catoe suggests in his brief that the trial judge improperly excluded evidence of such an agreement because he viewed it as parol evidence varying the terms of the express contract. While Catoe's contention may have some merit, *see Williams & Associates v. Ramsey Products Corp.*, 19 N.C. App. 1, 4, 198 S.E. 2d 67, 69 (1973), cert. denied, 284 N.C. 125, 199 S.E. 2d 664 (1973), Catoe assigned no error to this ruling, and therefore it will not be reached on appeal. *See* N.C. R. App. P. 10.

We hold that none of the trial judge's instructions were in error.

No error.

Judges WELLS and PHILLIPS concur.

JOHN W. SEABERRY v. W. T. BRIDGERS CONTRACT LABOR AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 878SC1176

(Filed 4 October 1988)

1. Master and Servant § 108—unemployment compensation—employment to terminate on certain date—separation not due to lack of available work—N.C.G.S. § 96-14(1) inapplicable

In a proceeding to recover unemployment benefits, N.C.G.S. § 96-14(1) was inapplicable where the employer gave petitioner notice that his employment would end on a certain date in the future; petitioner quit before that date; and the employer failed to carry his burden of showing that the impending separation was for "lack of available work."

2. Master and Servant § 108—unemployment compensation—employee's separation prior to date set by employer—separation voluntary and without good cause

Petitioner's separation from employment earlier than the future date specified by the employer was voluntary and without good cause where suitable employment remained available to the claimant for several days, and the nature of the employer's notice was not offensive.

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3. Master and Servant § 108—unemployment compensation—employment to terminate on certain date—separation from employment involuntary

Petitioner was entitled to unemployment benefits for that period of time after the date on which employment was scheduled to terminate, since separation as of that time was beyond the control of claimant and was at the request of employer; the quit therefore was not voluntary; and the involuntary quit was with good cause, as employment was no longer available to claimant, and claimant did not indicate any unwillingness to work.

APPEAL by petitioner from *Fountain (George M.), Judge*. Judgment entered 16 March 1987 in Superior Court, WAYNE County. Heard in the Court of Appeals 7 April 1988.

Eastern Carolina Legal Services, Inc., by Jack Holtzman, for petitioner-appellant.

Employment Security Commission of North Carolina, by T. S. Whitaker, Chief Counsel, and Jane H. Dittmann, Staff Attorney, for respondent-appellee.

GREENE, Judge.

This is an appeal from a judgment of the Superior Court affirming an Employment Security Commission decision denying petitioner, John W. Seaberry, unemployment benefits.

Petitioner was employed as a laborer by W. T. Bridgers Contract Labor (hereinafter "Bridgers" or "employer") from approximately January 1985 until 9 July 1986. On the latter date, the employer told petitioner he no longer needed petitioner but that he could work the remainder of that week and the next week. Petitioner then on that same day left the employer's premises and did not return to work. Petitioner filed a claim for unemployment benefits on 13 July 1986. This claim was denied by an Employment Security Commission adjudicator and claimant appealed to an appeals referee. After conducting an evidentiary hearing, the referee also denied petitioner's claim, and was affirmed by the Employment Security Commission. A Superior Court affirmed the decision of the Employment Security Commission on 16 March 1987. Petitioner appeals from this judgment.

This appeal presents the issue of whether petitioner is disqualified from receiving unemployment benefits because he volun-

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tarily quit his employment without good cause attributable to his employer.

At the hearing on petitioner's claim, the appeals referee made the following pertinent findings of fact, which were adopted by the Employment Security Commission:

3. Claimant was employed as a laborer. The claimant worked for the employer for approximately eighteen months. The claimant's job duties included cleaning up job sites, hauling trash, digging ditches and carpentry.

4. On July 9, 1986, the employer told the claimant that he no longer needed the claimant. The employer also informed the claimant that claimant could work the remainder of the week and the next week. Work was available for the claimant until on or about July 18, 1986.

. . . .

6. The employer chose to discharge the claimant effective July 18, 1986 because the employer believed that claimant's weight limited claimant's ability to perform construction work. The claimant weighs approximately two hundred eighty five pounds. The claimant was unable to perform construction duties such as working while standing on ladders and working under houses because of his weight.

7. The claimant alleges that he was discharged from employment. The employer alleges that the claimant voluntarily left the job. It is found as a fact that the claimant voluntarily left the job.

8. On several prior occasions, the employer informed the claimant that claimant's weight restricted his ability to perform certain types of construction work.

9. When claimant left the job, continuing work was available for claimant there.

From these findings of fact the referee concluded "the record evidence and facts found therefrom do not support a conclusion that the claimant has met the burden of showing good cause attributable to the employer for the voluntary leaving." The referee went on to find that petitioner was disqualified for benefits.

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Under N.C.G.S. Sec. 96-14(1) (1985), an employee is ineligible for unemployment benefits if he is "unemployed because he left work voluntarily without good cause attributable to the employer." This statute requires disqualification if (1) claimant left work voluntarily *and* (2) without good cause attributable to the employer. *Eason v. Gould, Inc.*, 66 N.C. App. 260, 261, 311 S.E. 2d 372, 373 (1984), *aff'd per curiam without precedential value*, 312 N.C. 618, 324 S.E. 2d 223 (1985). An employee has not left voluntarily "when events beyond the employee's control or the wishes of the employer cause the termination." *Id.* at 262, 311 S.E. 2d at 373. "Good cause" is defined as that which "would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *In re Watson*, 273 N.C. 629, 635, 161 S.E. 2d 1, 7 (1968). Cause "attributable to the employer" is a cause which is "produced, caused, created or as a result of actions by the employer." *In re Vinson*, 42 N.C. App. 28, 31, 255 S.E. 2d 644, 646 (1979). The burden is on the employer to demonstrate that a claimant is disqualified under this two-prong test. See *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 377, 289 S.E. 2d 357, 360 (1982); *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 445, 349 S.E. 2d 842, 845 (1986).

[1] Our Supreme Court has held that when an employee leaves his employment after notification of an impending separation and before the scheduled date of the separation, the claimant's entitlement to unemployment benefits must be determined in two parts: (1) that period of time before the scheduled separation and (2) that period of time after the scheduled separation. See *In re Poteat v. Employment Security Comm.*, 319 N.C. 201, 206, 353 S.E. 2d 219, 222 (1987). In both instances, the question presented is whether the claimant quit voluntarily and without good cause. However, N.C.G.S. Sec. 96-14(1) as amended effective 1 July 1985 *may* preclude the necessity of applying this two-part test to determine entitlement to unemployment benefits. That statute provides in pertinent part:

Where an employer notifies an employee that such employee will be separated on some definite future date for lack of available work, the *impending separation does not constitute good cause for quitting that employment*, provided that if the individual quits because of the impending separation and shows to the satisfaction of the Commission that it was im-

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practicable or unduly burdensome for the individual to work until the announced separation date, the period of disqualification imposed under this subsection (1) shall be reduced to the greater of four weeks or the period running from the beginning of the week during which application for benefits was made until the end of the week of the announced separation date.

N.C.G.S. Sec. 96-14(1) (1985) (emphasis added).

If the statute applies, the claimant would be disqualified from unemployment benefits, not only for the period of time prior to the scheduled separation, but also for that period of time after the date of the scheduled separation, *unless* the claimant proves "it was impracticable or unduly burdensome for the individual to work until the announced separation date." If the claimant proves this to "the satisfaction of the Commission," the claimant is entitled to full benefits, with only a limited period of disqualification as provided in the closing provisions of N.C.G.S. Sec. 96-14(1).

This portion of the statute applies if the employer proves that the claimant, after notification by the employer of impending separation "on some definite future date," voluntarily left his employment before the date of his scheduled separation and the cause of the separation is "for lack of available work."

Here, there is no evidence that the impending separation was for "lack of available work" and therefore the employer has failed in his burden. The evidence offered supports the referee's finding of fact that the claimant's employment duties included "cleaning up job sites, hauling trash, digging ditches and carpentry." While there is some evidence in the record that claimant's weight interfered with some of his employment duties, the employer offered no evidence that the weight of the claimant interfered with all of the claimant's duties to the extent that there was "no available work" for claimant. Accordingly, that portion of N.C.G.S. Sec. 96-14(1) establishing *per se* the issue of "good cause" is not applicable.

Therefore, pursuant to *Poteat*, we must determine claimant's entitlement to benefits for that period of time before the scheduled separation and that period of time after the scheduled separation.

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A

[2] We first determine if the claimant is disqualified for benefits for that period of time prior to the scheduled separation.

As to the question of voluntariness, when the claimant leaves his employment, after notice of impending separation, knowing that suitable work remains available for him with the same employer and if the notice of the impending separation is not offensive so "as to embarrass or humiliate the claimant," the early quit by the claimant is voluntary. *Poteat*, 319 N.C. at 204-05, 353 S.E. 2d at 221.

Here there is no evidence that the notice was offensive so "as to embarrass or humiliate the claimant." The finding of fact by the Commission, to which there was no exception, was that "the employer told the claimant that he no longer needed the claimant." Compare *Bunn v. N.C. State University*, 70 N.C. App. 699, 701, 321 S.E. 2d 32, 34 (1984), *disc. rev. denied*, 313 N.C. 173, 326 S.E. 2d 31 (1985) (claimant's quit was not voluntary where employer told claimant that she was to be discharged because her on-the-job test results were "pitiful," that she worked slowly, and that her spelling was poor) with *Poteat*, 319 N.C. at 204, 353 S.E. 2d at 221 (claimant's quit was voluntary where employer told claimant he was to be discharged because of "missing work and not being dependable for regular work"). Furthermore, the claimant quit of his own volition and suitable work was available for seven more days. Accordingly, the quit by this claimant prior to the date of the scheduled separation was voluntary.

As the amended statute does not determine *per se* the issue of "good cause," the "good cause" issue must be resolved by reference to prior opinions of our courts. See, e.g., *Poteat*, 319 N.C. at 205, 353 S.E. 2d at 222; *Eason*, 66 N.C. App. at 262, 311 S.E. 2d at 373-74; *Bunn*, 70 N.C. App. at 702, 321 S.E. 2d at 34. Considering the facts of this case in light of these opinions, the voluntary quit of this claimant was "without good cause," during the first period, as suitable employment remained available to the claimant for several days and the nature of the notice was not offensive.

B

[3] We next address the question of entitlement to benefits for that period of time after the date on which the employment was

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scheduled to terminate. As to that period, the separation was beyond the control of the claimant and was at the request of the employer. Therefore, this quit was not voluntary. Furthermore, the involuntary quit was with good cause, as employment was no longer available to the claimant and the claimant did not indicate any unwillingness to work. The lack of employment was solely caused by the actions of the employer.

C

Therefore, the order of the Superior Court affirming the decision of the Employment Security Commission denying claimant unemployment benefits is modified. For the period during which the claimant could have continued to work for the employer, the decision denying benefits is affirmed and to the extent that benefits were denied after the date on which the employment was scheduled to terminate, the decision is vacated. As the record indicates, there may be alternate bases upon which a judgment favorable to the employer may be supported (i.e., "misconduct" under N.C.G.S. Sec. 96-14(2) or "substantial fault" under N.C.G.S. Sec. 96-14(2A)). Therefore, the matter must be remanded. We find no merit to the remaining assignments of error raised by the appellant.

The cause is remanded to the Superior Court for remand to the Employment Security Commission for proceedings consistent with this opinion.

Affirmed in part, vacated in part and remanded.

Judges BECTON and JOHNSON concur.

ALLSTATE INSURANCE COMPANY v. JOHNIE KEITH McCRAE, DONNIE LEE WALL, LEO ELLERBE, JR., AND ANTHONY ELLERBE

No. 8820SC117

(Filed 4 October 1988)

1. Insurance § 81— automobile liability insurance—assigned risk policy—notice of cancellation required from insurer

N.C.G.S. § 20-309(e) (1983), applicable at all times relevant to this case, required plaintiff insurer to notify the Division of Motor Vehicles of the lapse in

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an insured's automobile liability coverage, and there was no merit to plaintiff's contention that subsection (e) meant that the Commissioner could waive the notice requirement; rather, the words of that statute merely allowed the Commissioner to direct the manner by which the insurer should furnish such notice.

2. Insurance § 81— automobile liability insurance—termination of assigned risk policy—failure to notify DMV—insurance coverage continued

Pursuant to N.C.G.S. § 20-309(e) (1983), plaintiff had a duty to notify the Division of Motor Vehicles of the termination of insured's automobile liability policy, and its failure to so notify continued to give effect to the insurance coverage.

APPEAL by plaintiff from *Joseph R. John, Judge*. Judgment entered 15 October 1987 in Superior Court, RICHMOND County. Heard in the Court of Appeals 29 August 1988.

*Henson, Henson, Bayliss & Coates by Paul D. Coates, of Counsel, for plaintiff-appellant.**

Sharpe & Buckner by Richard G. Buckner for Johnie Keith McCrae, defendant-appellee.

Page, Page & Webb by Alden B. Webb for Donnie Lee Wall, defendant-appellee.

BECTON, Judge.

In this declaratory judgment action, plaintiff, Allstate Insurance Company, seeks to have declared void a policy of automobile liability insurance it issued to Leo Ellerbe, Jr. The trial court granted summary judgment for defendants Johnie Keith McCrae and Donnie Lee Wall, and from this order Allstate appeals. We affirm.

I

The parties do not dispute the pertinent facts. On 13 August 1983, Allstate issued a noncertified assigned risk policy of automobile liability insurance to Leo Ellerbe, Jr. This policy, issued pursuant to The Vehicle Financial Responsibility Act of 1957, N.C. Gen. Stat. ch. 20, art. 13, covered a 1967 Ford automobile, the period of coverage extending from 13 August 1983 until 13 February 1984.

* At the time this appeal was filed, Mr. Coates was affiliated with the firm of Henson, Henson, Bayliss & Coates. He has since joined the firm of Nichols, Caffrey, Hill, Evans & Murrelle.

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On 5 January 1984, Allstate mailed to Mr. Ellerbe an offer to renew the policy. The offer specified that Mr. Ellerbe could continue his coverage only "BY PREMIUM PAYMENT BY THE DUE DATE, OTHERWISE [THE] CURRENT POLICY WILL EXPIRE WITHOUT FURTHER NOTICE." Mr. Ellerbe did not make payment by the date indicated, 12 February 1984. At no time after 12 February did Allstate notify the Division of Motor Vehicles of the termination of Mr. Ellerbe's policy. On 6 April 1984, the 1967 Ford, in which McCrae and Wall rode as passengers, was involved in a traffic accident.

II

This appeal presents two questions. The first is whether North Carolina law required Allstate to notify the Division of Motor Vehicles of the lapse in Mr. Ellerbe's insurance coverage. If this question is answered in the affirmative, our second inquiry is whether Allstate's failure to provide such notification meant that Mr. Ellerbe's policy continued to be in effect.

A

[1] N.C. Gen. Stat. Sec. 20-309(e) (1983), applicable at all times relevant to this appeal, said in part that:

- (e) Upon termination by cancellation or otherwise of an insurance policy provided in subsection (d), the insurer shall notify the North Carolina Division of Motor Vehicles of such termination as directed by the Commissioner of the Division of Motor Vehicles in accordance with subsection (f) of this section.

Subsection (f) in part provided that:

- (f) The Commissioner shall administer and enforce the provisions of this Article and may make rules and regulations necessary for its administration

Allstate argues that the words "*As directed by the Commissioner*" (emphasis added), when coupled with the enabling language of subsection (f), signify that the Legislature delegated discretion to the Commissioner to waive the notification requirement of subsection (e). Allstate seeks to support its reading of the statute by citing the Commissioner's regulation concerning termination notices, which at that time mandated notification only of

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the termination of policies effective for less than six months. N.C. Admin. Code tit. 19A, r. 03C.0300(2)(b) (March 1982). Allstate argues, in short, that because the Commissioner did not direct that notice be given of the termination of a six-month policy, Allstate had no duty under subsection (e) to notify the Division of the lapse in Mr. Ellerbe's insurance.

We do not agree with Allstate's reading of the notification requirement. Further, although the interpretation of a statute by the officer charged with its administration is helpful to a court in construing legislative language, such construction is not controlling. *Faizan v. Insurance Co.*, 254 N.C. 47, 57, 118 S.E. 2d 303, 310 (1961). If there is a conflict between administrative interpretation and that of the court, the latter will prevail. *Id.* Rather than reading the "as directed by" language of subsection (e) to mean the Commissioner could waive the notification requirement, we agree with defendants that the words merely allowed the Commissioner to direct the *manner* by which the insurer should furnish such notice.

Our view is consistent with the mandatory language of subsections (e) and (f). The former directed that the insurer "*shall* notify" and the latter that the Commissioner "*shall* administer and enforce the provisions of this Article." N.C. Gen. Stat. Secs. 20-309(e), (f) (1983) (emphasis added). Subsection (f) gave the Commissioner discretion only in the making of rules and regulations necessary "*to administer*" the Financial Responsibility Act. It did not invest the Commissioner with authority to override or to modify other provisions of the Act.

The purpose of the notification requirement is to enable the Division to recall the registration and license plate issued for a vehicle unless the owner makes some other provision for compliance with the Financial Responsibility Act. See *Insurance Co. v. Cotten*, 280 N.C. 20, 30-31, 185 S.E. 2d 182, 188 (1971). Surely, a motorist whose six-month policy permits him to obtain license tags for one year cannot be expected, in all cases, to surrender those tags when his policy lapses. To protect innocent third parties from the risks posed by uninsured motorists, our Legislature placed responsibility upon insurance companies to notify the Division of Motor Vehicles that an insured's coverage had ended. Notwithstanding the construction the Commissioner gave to it, we

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hold that subsection (e) required Allstate to notify the Division of the termination of Mr. Ellerbe's policy.

We do not anticipate that the rule we announce today regarding the 1983 version of subsection (e) will have an undue impact upon insurers. The General Assembly eliminated the "as directed by the Commissioner" language from the statute, effective as of 15 September 1984, and subsection (e) now plainly requires that "[u]pon termination by cancellation or otherwise of an insurance policy . . . *the insurer shall notify the Division of such termination.*" N.C. Gen. Stat. Sec. 20-309(e) (Supp. 1987) (emphasis added). Subsection (e) today makes even more clear the Legislature's intention in its 1983 wording of the notification requirement.

B

[2] Having concluded that Allstate had an obligation to notify the Division that Mr. Ellerbe's policy had not been renewed, we now examine the effect of Allstate's failure to provide such notice. Allstate insists that Mr. Ellerbe's coverage expired on 13 February 1984 irrespective of Allstate's neglecting to so advise the Division. We believe Allstate's position to be untenable in light of both the legislative history of subsection (e) and the public-policy reasons underlying the Financial Responsibility Act.

Prior to its 1983 version, subsection (e) distinguished, for notification purposes, between policies terminated by the insurer and those terminated by the insured. For example, in instances in which the insurance company cancelled the coverage, subsection (e) at one time required the insurer to give 15-days' notice to the Division prior to the cancellation. N.C. Gen. Stat. Sec. 20-309(e) (1965). Such notification was a prerequisite to effective termination. *See Insurance Co. v. Hale*, 270 N.C. 195, 199-200, 154 S.E. 2d 79, 83-84 (1967); *Insurance Company v. Davis*, 7 N.C. App. 152, 158, 171 S.E. 2d 601, 604 (1970).

On the other hand, when the insured terminated coverage, subsection (e) required the insurance company to notify the Division subsequent to the termination. *See, e.g.*, N.C. Gen. Stat. Sec. 20-309(e) (1965). North Carolina case law uniformly held that, under circumstances in which the insured's own act caused coverage to end, the insurer's notifying the Division was *not* a condition precedent to effective cancellation. *See, e.g.*, *Cotten*, 280 N.C.

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at 29, 185 S.E. 2d at 188; *Bailey v. Insurance Co.*, 19 N.C. App. 168, 171-72, 198 S.E. 2d 246, 249 (1973).

The 1983 version of subsection (e) eliminated the distinction between insurer/insured terminations for notification purposes. Regardless of which party cancelled, subsection (e) (1983) required the insurance company to "immediately" provide the Division with notice of the termination. We must attempt to infer what the Legislature intended when it instituted the single notice requirement in the 1983 statute. Either the General Assembly contemplated that notification by the insurer would be a prerequisite to cancellation, or else it considered that the insurer's failure to notify would be of no consequence to effective termination. We incline toward the former view.

From its inception, our courts have seen the Financial Responsibility Act as a remedial statute, protecting persons injured by the negligent operation of automobiles. *See, e.g., Swain v. Insurance Co.*, 253 N.C. 120, 126, 116 S.E. 2d 482, 487 (1960). This remedial purpose is vitiated if the notification requirement of the 1983 statute is read in such a way as to have allowed an uninsured vehicle to operate on our roads without an insurance company being under any effective obligation to alert the Division of lapsed coverage. We do not believe the Legislature intended the notification provision to have been a nullity, allowing insurance companies to ignore subsection (e) without fear of liability. Nor do we believe that the Legislature contemplated that subsection (e) would be read in such a way as to expose innocent individuals to the risk of injury without means of adequate compensatory redress. Rather, we believe that the General Assembly in amending subsection (e) so as to impose a single notification requirement intended such notice to be a condition precedent to the termination of a noncertified assigned risk liability policy. On this basis, the cases relied upon by Allstate, all decided under earlier versions of subsection (e) that differentiated between insurer and insured terminations, can be distinguished.

III

We hold, therefore, that Allstate had a duty under N.C. Gen. Stat. Sec. 20-309(e) (1983) to notify the Division of Motor Vehicles of the termination of Mr. Ellerbe's policy. Its failure to so notify continued to give effect to the insurance coverage and Allstate,

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consequently, was the insurer of Mr. Ellerbe's vehicle on 6 April 1984. The trial court's order granting summary judgment to defendants McCrae and Wall is

Affirmed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. PAUL MICHAEL TUCKER

No. 8727SC420

(Filed 4 October 1988)

Criminal Law § 122.1— jury's request for additional instructions—instruction given only to foreman—error

Where the jury foreman came to the courtroom to ask the trial court if the jury could convict of first degree rape without convicting of first degree kidnapping, and vice versa, the trial court erred in discussing the jury's question with the foreman only to the exclusion of the rest of the jury, since there was great danger that the question presented and the trial court's response might be inaccurately relayed by the foreman to the remaining jurors, and such procedure was in violation of N.C.G.S. § 15A-1234(a)(1) and constituted prejudicial error entitling defendant to a new trial, even though he failed to object at trial.

APPEAL by defendant from *Owens, Hollis M., Jr., Judge*. Judgments entered 5 December 1986 in Superior Court, LINCOLN County. Heard in the Court of Appeals 16 November 1987.

Attorney General Lacy H. Thornburg by Associate Attorney General Rodney S. Maddox for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Geoffrey C. Mangum for defendant appellant.

COZORT, Judge.

Defendant was charged on indictments proper in form with first degree rape, first degree sexual offense, and first degree kidnapping. He was first tried at the 11 March 1985 session of Lincoln County Superior Court where he was convicted of each charge and sentenced to life terms to run concurrently on the

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first two offenses, and a twelve-year concurrent term on the last. On appeal the North Carolina Supreme Court found error and granted a new trial on all charges. *State v. Tucker*, 317 N.C. 532, 346 S.E. 2d 417 (1986).

Defendant was tried again at the 1 December 1986 session of Lincoln County Superior Court. He was convicted of second degree rape, second degree sexual offense, and second degree kidnapping. He was sentenced to 30 years on the rape charge, twenty years consecutive on the sex offense charge, and nine years concurrent on the kidnapping charge. Defendant appeals. We grant a new trial.

The evidence for the State tends to show that defendant began dating Imogene Parker in December of 1984. Ms. Parker tried to terminate their relationship. Ms. Parker agreed to meet defendant on 9 January 1985 to discuss their relationship. While they were riding around in defendant's truck, defendant stopped the truck and forced Ms. Parker from the truck at knife point. Defendant threatened Ms. Parker with the knife and forced her to perform oral sex on him and to have sexual intercourse with him.

Defendant testified that he and Ms. Parker had sexual intercourse on the date in question. He testified that Ms. Parker consented to the sexual intercourse and that she reluctantly agreed to perform oral sex on defendant to provide lubrication so that defendant could achieve penetration.

Defendant contends in his first assignment of error that the trial court erred by discussing a question from the jury with the foreman only to the exclusion of the rest of the jury. After the jury had retired to the jury room, the court was notified that the jury had a question. The following conversation transpired:

THE COURT: All right, tell the foreman to come in.

BAILIFF: Just the foreman?

THE COURT: Yes.

(Foreman returns to courtroom)

FOREMAN: Your Honor, may I approach the bench?

THE COURT: No, Mr. Foreman, if you have a question, why, you can state it right there; is that what you have?

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FOREMAN: Yes, sir, we want a clarification on First Degree Kidnapping and First Degree Rape.

THE COURT: Well, what sort of clarification do you want?

FOREMAN: Should, would the same process, would we have to use the same thing on rape as we would on kidnapping?

THE COURT: Well, I don't quite, I don't quite understand the question. The elements of the two crimes are different. The elements the State has, the things that the State has to prove beyond a reasonable doubt are different for First Degree Rape and for Kidnapping.

FOREMAN: That's the question we're trying to get straight, Your Honor. Thank you. You answered my question right there. The question was that if, if it was First Degree Rape, then it wouldn't necessarily have to be First Degree Kidnapping or vice versa?

THE COURT: The offenses are separate, and the jury should consider all three offenses separate and arrive at separate verdicts under the, under the separate instructions that I've given you.

FOREMAN: Thank you, Your Honor.

THE COURT: Do you understand?

FOREMAN: Yes, sir, you satisfied our . . .

THE COURT: All right, now, just a minute.

FOREMAN: Yes, sir.

THE COURT: Counsel approach the bench.

(Conversation off the record at the bench between Mr. Lafferty, Mr. Shufford, and the Court)

THE COURT: All right, Mr. Foreman, you can return to the jury room if that answers your question.

FOREMAN: Thank you, sir. Thank you, sir.

(Foreman returns to jury room)

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Defendant argues that the trial court's communicating with the jury foreman to the exclusion of the other jurors violates the provisions of N.C. Gen. Stat. § 15A-1234 and the rule articulated by our Supreme Court in *State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985). We agree.

In *Ashe*, the jury foreman came to the courtroom to ask the trial court if the jury could review the transcript of evidence. The trial court informed the foreman that there was no transcript and that the foreman was to tell the other jurors to review the evidence as they could recall it. In finding error the Supreme Court relied on N.C. Gen. Stat. § 15A-1233(a) (1987), which provides:

(a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

The Supreme Court found the statute required all jurors to be returned to the courtroom:

The statute requires all jurors to be returned to the courtroom when the jury "requests a review of certain testimony or other evidence." We are satisfied the statute means that all jurors must be present not only when the request is made, but also when the trial court responds to the request, whatever that response might be. Our holding on this point is supported both by the language of the statute and the statute's purpose.

Our jury system is designed to insure that a jury's decision is the result of evidence and argument offered by the contesting parties under the control and guidance of an impartial judge and in accord with the judge's instructions on the law. All these elements of the trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreman, another individual juror, or anyone else to com-

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municate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, even the jury foreman, having alone made the request of the court and heard the court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment. Then, each juror, rather than determining for himself or herself the import of the request and the court's response, must instead rely solely upon their spokesperson's secondhand rendition, however inaccurate it may be.

Thus, we hold that for the trial court in this case to hear the jury foreman's inquiry and to respond to it without first requiring the presence of all jurors was an error in violation of N.C.G.S. § 15A-1233.

Ashe, 314 N.C. at 36, 331 S.E. 2d at 657.

In the case below, the jury foreman's question concerned the court's instructions to the jury on the law applicable to the case. The governing statute is N.C. Gen. Stat. § 15A-1234(a)(1) (1987), which provides that "[a]fter the jury retires for deliberation, the judge may give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court . . ." Subsection (d) requires that "[a]ll additional instructions must be given in open court and must be made a part of the record."

We find the Supreme Court's reasoning in *Ashe* concerning § 15A-1233(a) applicable to the situation which arose herein under § 15A-1234(a). The same danger is present: the question presented and the trial court's response may be inaccurately relayed by the foreman to the remaining jurors. In fact, the situation in this case may present more danger because the request involved the court's instructions on the elements necessary to prove each offense, and not just a request to review the transcript as was the case in *Ashe*. We hold it was error for the trial court to fail to bring the entire jury to the courtroom to respond to the jury's question.

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We now consider whether the court's error entitles defendant to a new trial. In *Ashe*, the Supreme Court found the trial court's error so prejudicial that a new trial was required:

Although the foreman might have relayed this exact message, he might as easily have conveyed some altered message or phrased the judge's response in his own words in such a way as to alter its connotation and its import. The manner in which he reported his request and the response might have led the other jurors to believe the trial court thought the evidence which the jury wanted reviewed unimportant or not worthy of further consideration.

Ashe, 314 N.C. at 38-39, 331 S.E. 2d at 659.

Following the Supreme Court's logic in *Ashe* again, we find the error below to be reversible error. The jury foreman struggled in his effort to present the question to the trial court. There was a great opportunity for miscommunication to the remaining jurors to the prejudice of defendant.

The State argues, however, that defendant has waived his right to raise the error on appeal because he failed to object at trial. In *Ashe*, the Supreme Court held the defendant did not have to object at trial in order to pursue his argument concerning § 15A-1233(a) on appeal. *Id.* at 40, 331 S.E. 2d at 659. We do not believe the situation presented under § 15A-1234(a) is distinguishable, and we likewise hold defendant did not waive his right to pursue his appeal herein. We hold defendant is entitled to a new trial.

Defendant brought forward three other assignments of error. In light of our holding, it is unnecessary to review those assignments of error.

New trial.

Judges WELLS and JOHNSON concur.

State ex rel. Rhodes v. Simpson

STATE OF NORTH CAROLINA EX REL. S. THOMAS RHODES, SECRETARY, DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT V. VIVIAN ANNE SIMPSON

No. 873SC1128

(Filed 4 October 1988)

1. Appeal and Error § 6.9; Jury § 1— jury trial allowed—appealability of order

The State could properly appeal from an interlocutory order denying its motion to deny defendant's request for a jury trial, since the right not to have a case tried by a jury is a substantial right.

2. Jury § 1— destruction of coastal wetlands alleged—landowner's right to jury trial

Where plaintiff alleged that defendant destroyed coastal wetlands and contaminated estuarine waters, and plaintiff sought an injunction to enjoin defendant from developing or filling in any more lands and to require her to remove materials illegally put there, Article I, § 25 of the North Carolina Constitution applied to provide defendant with a trial by jury, since the controversy here was one "respecting property," in that it affected defendant's right to use her property as she saw fit, and it was one "at law," in that its purpose was to rectify damage allegedly done to the land held in trust for the public by requiring defendant to restore the land to its former condition or pay damages therefor.

APPEAL by plaintiff from *Tillery, Judge*. Order entered 25 June 1987 in Superior Court, CARTERET County. Heard in the Court of Appeals 6 April 1988.

Inter alia, the Dredge and Fill Act of 1969 (G.S. 113-229) and the Coastal Area Management Act of 1974 (G.S. 113A-100, *et seq.*) require owners of land situated on a marsh or wetland or within certain distances of a beach, sound or estuary to obtain a Coastal Area Management Act permit before filling in or otherwise developing such land, and both acts authorize the Secretary of the Department of Natural Resources and Community Development to sue landowners for violations by a civil action. In the action authorized by G.S. 113-229(1) damages and injunctive relief may be obtained and—

. . . such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section . . .;

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and in the action authorized by G.S. 113A-126(a) penalties may be recovered, and injunctive and "such other or further relief in the premises as said court shall deem proper" may be obtained. Neither act refers to or purports to authorize a jury trial. In this action the State alleges that defendant, who owns certain land bordering on Cales Creek in Carteret County, violated both acts by filling in about 5,000 square feet of land designated as coastal wetlands and a protectable area of environmental concern under 15 NCAC 7H.0101, *et seq.*, without obtaining a permit and it asks that she be enjoined from developing or filling in any more lands subject to the acts and compelled to remove the materials illegally put there and that it be given "such other and further relief" as the court deems proper. In her answer defendant denies the allegations that her land is within the "coastal wetlands" as statutorily defined and denies that she filled it in to the damage of wetlands held by plaintiff in trust for the public, and requested a jury trial on the factual issues raised. The State moved to deny defendant's request for a jury trial and appealed from an order denying the motion.

Attorney General Thornburg, by Assistant Attorney General J. Allen Jernigan, for the State.

Bennett, McConkey, Thompson, Marquardt & Wallace, by Thomas S. Bennett, for defendant appellee.

PHILLIPS, Judge.

[1] Though the State's appeal is from an interlocutory order, it is authorized since the right not to have a case tried by a jury is a substantial right, no less than is the right to a jury trial. *Faircloth v. Beard*, 320 N.C. 505, 358 S.E. 2d 512 (1987). The only question it presents is whether the following guarantee:

In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

contained in Section 25 of Article I of the North Carolina Constitution applies to this case. The trial court held that it does and we agree.

[2] Though Section 25 contains no such qualification the State correctly notes that it has been construed to apply only to actions

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respecting property in which the right to a jury trial existed either at common law or by statute before the 1868 Constitution became operative and for actions created since then the right to a jury trial depends upon statutory authority, *The Chowan & Southern Railroad Co. v. Parker*, 105 N.C. 246, 11 S.E. 328 (1890); and it points out that in the absence of an enactment authorizing a jury trial it has been held that there is no right to a jury trial in several actions created by the General Assembly since 1868, among which are disbarment proceedings, *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E. 2d 89 (1982), proceedings to terminate parental rights, *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981), and actions for equitable distribution, *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E. 2d 57 (1985). Based on these holdings the State argues that since this action was recently created by the legislature without providing for a jury trial the constitutional guarantee does not apply. We disagree; for the controversy is at law and respects property, as the constitutional provision requires, and the action is of a type that has always been accompanied by a right to trial by a jury.

A controversy is one "respecting property" if it affects any right in the property or in its use, *Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E. 2d 897 (1943), and this controversy affects defendant's right to use her property as she sees fit. The action is "at law," since its purpose is not merely to restrain defendant from violating the acts in the future, but to rectify the damage allegedly done to the land held in trust for the public by requiring her to restore the land to its former condition or pay damages therefor. That damages were not prayed for in the complaint is immaterial, they can be recovered if the evidence warrants. *Peele v. Hartsell*, 258 N.C. 680, 129 S.E. 2d 97 (1963). Thus, this is an action for damage done to real estate, as ancient an action as the common law knows; and also an action for misusing land to the detriment of the public, which in essence is the ancient action to abate a nuisance, as the Supreme Court of the United States recognized in *Tull v. United States*, 481 U.S. ---, 95 L.Ed. 2d 365, 107 S.Ct. 1831 (1987); and in this State a land-owner charged with making a public nuisance of his property is entitled to a jury trial if timely demand therefor is made. *State ex rel. Bowman v. Malloy*, 264 N.C. 396, 141 S.E. 2d 796 (1965). That the alleged detriment to the public good in this instance—

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the destruction of coastal wetlands and the contamination of estuarine waters—did not arouse the public until recently does not make an ancient action a new creation. Landowners who use their property to the detriment of the public and others have always been subject to the law's authority in this State; in exercising that authority the ancient practice has been followed of using a jury to determine the disputed facts if requested, and for the reasons stated that practice must be followed in this case.

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

WILLIAM E. DAVIS v. DURHAM CITY SCHOOLS

No. 8814SC181

(Filed 4 October 1988)

Malicious Prosecution § 4; Libel and Slander § 9; Schools § 13— teacher's suspected abuse of students—principal's report to DSS and to superior—reports privileged

Plaintiff's claims for malicious prosecution, intentional infliction of emotional distress, and negligence based upon a criminal action resulting from a school principal's report to the Department of Social Services that plaintiff substitute teacher may have physically abused students while disciplining them were barred by N.C.G.S. § 7A-550; furthermore, a report made in good faith by the principal to the Assistant Superintendent of Personnel clearly fell within the scope of immunity contemplated by that statute so that the report could not serve as the basis for plaintiff's defamation action.

APPEAL by plaintiff from *Bailey (James H. Pow), Judge*. Judgment entered 22 September 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 30 August 1988.

Plaintiff was employed as a substitute teacher in the Durham City School System. In December 1985, plaintiff taught at the R. N. Harris Elementary School on three or four occasions. Gertrude P. Williams, the principal of the R. N. Harris School, learned from plaintiff's students that plaintiff may have physically abused students while disciplining them. Ms. Williams informed the Department of Social Services and the Assistant Superintend-

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ent of Personnel of her findings. After a police investigation of the matter, plaintiff was charged with five counts of assault. Plaintiff was tried and acquitted on all counts.

After his acquittal, plaintiff filed this action. Plaintiff's complaint alleges causes of action based on malicious prosecution, defamation, intentional infliction of emotional distress, and negligence. Defendant moved for summary judgment, and the trial court granted defendant's motion on all issues. Plaintiff appeals.

Romallus O. Murphy for plaintiff-appellant.

Spears, Barnes, Baker, Hoof and Wainio, by Gary M. Whaley, for defendant-appellee.

PARKER, Judge.

Plaintiff contends that the trial court erred in entering summary judgment for defendant. A defendant's motion for summary judgment is properly granted when the defendant conclusively establishes a complete defense to the plaintiff's claims. *Thomas v. Ray*, 69 N.C. App. 412, 416, 317 S.E. 2d 53, 56 (1984). In the present case, defendant's motion was supported by depositions, answers to interrogatories, and affidavits. Plaintiff did not submit any materials in opposition to the motion. Therefore, the motion was properly granted if defendant's supporting materials established a complete defense to plaintiff's claims, as plaintiff could not rely upon the allegations of his complaint to raise a triable issue of fact. See *Enterprises v. Russell*, 34 N.C. App. 275, 278, 237 S.E. 2d 859, 861 (1977).

Plaintiff's claims are based upon the principal's reporting complaints by students to other authorities; the report eventually led to a criminal action against plaintiff. Plaintiff seeks to impose liability on defendant for the acts of its employee. Plaintiff's complaint alleges that the principal "procured the issuance of criminal complaints against the plaintiff." The affidavit of the police officer who investigated the matter, however, clearly establishes that the decision to prosecute was made solely by the officer based upon the results of his investigation, and the principal was not involved in any way in the issuance of warrants against plaintiff. Defendant's answers to interrogatories establish that the prin-

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cipal reported the students' complaints only to the Department of Social Services and the Assistant Superintendent of Personnel. On deposition, plaintiff testified that he did not know who the principal reported to or what she reported about plaintiff.

Under G.S. 115C-400, any school employee who has "cause to suspect" child abuse must report the case to the Director of Social Services as provided in G.S. 7A-543 through 7A-552. General Statute 7A-550 provides:

Anyone who makes a report pursuant to this Article, cooperates with the county department of social services in any ensuing inquiry or investigation, testifies in any judicial proceeding resulting from the report, or otherwise participates in the program authorized by this Article, is immune from any civil or criminal liability that might otherwise be incurred or imposed for such action provided that the person was acting in good faith. In any proceeding involving liability, good faith is presumed.

Thus, no liability can be premised upon the principal's report to the Department of Social Services, or upon the ensuing criminal proceedings, so long as the principal acted in good faith. Because the present action is one "involving liability," good faith is presumed.

Although plaintiff's complaint alleges that the principal acted maliciously, defendant's evidence establishes that the principal's report was an accurate representation of the students' complaints. Plaintiff has come forward with no evidence to dispute or question defendant's evidence that the principal's report was made in good faith. Since the principal was under a statutory duty to report any reasonable suspicion of abuse, she clearly acted in good faith. Defendant cannot be held liable for the acts of its employee when there is no basis for the employee's liability. *See Altman v. Sanders*, 267 N.C. 158, 165, 148 S.E. 2d 21, 26 (1966).

Plaintiff's claims for malicious prosecution, intentional infliction of emotional distress, and negligence are based upon the criminal action which resulted from the report to the Department of Social Services and, therefore, those claims are barred by the statute. Only plaintiff's defamation claim may be supported solely

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by the report to the Assistant Superintendent of Personnel. In our view, however, the language of G.S. 7A-550 is broad enough to include the principal's report to the Assistant Superintendent of Personnel under the circumstances of this case. General Statute 7A-550 grants immunity from civil and criminal liability to anyone who makes a report or "otherwise participates in the program authorized by this Article." The obvious purpose of Article 44 of Chapter 7A is to eliminate child abuse, a sometimes elusive problem. When suspected child abuse occurs in a public school classroom, a report made in good faith by the principal of the school to his or her superior who is responsible for school personnel would clearly fall within the scope of the immunity contemplated by the statute. To say that the principal was protected in reporting the incident to the Department of Social Services but not in reporting to the Assistant Superintendent would be both contrary to the spirit of the statute and also impractical.

Moreover, because the principal's report to the Assistant Superintendent of Personnel related to plaintiff's conduct as a substitute teacher, the report would be at a minimum protected by a qualified privilege, *see Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). Hence, plaintiff cannot recover absent a showing of actual malice. *Dellinger v. Belk*, 34 N.C. App. 488, 238 S.E. 2d 788 (1977), *disc. rev. denied*, 294 N.C. 182, 241 S.E. 2d 517 (1978). As we have held above, defendant has established that the report was made in good faith on the basis of student complaints and plaintiff has offered no evidence to the contrary. Thus, there was no issue of fact as to malice and summary judgment was appropriate on the defamation claim. *Dellinger v. Belk, supra*.

For the foregoing reasons stated, the trial court's entry of summary judgment in defendant's favor is affirmed.

Affirmed.

Judges JOHNSON and COZORT concur.

Sampson County ex rel. McPherson v. Stevens

SAMPSON COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY,
EX REL. LUCILLE MCPHERSON, PLAINTIFF v. HENRY EARL STEVENS, DEFENDANT

No. 884DC225

(Filed 4 October 1988)

Bastards § 8.1— criminal charge of failure to support illegitimate child—not guilty verdict—no res judicata on paternity issue

A general verdict of not guilty of an N.C.G.S. § 49-2 criminal charge, willful neglect or refusal to provide adequate support for one's illegitimate child, does not operate as *res judicata* on the issue of paternity in a subsequent N.C.G.S. §§ 49-14 and -15 civil action to establish paternity and require support of an illegitimate child.

APPEAL by plaintiff from *Martin, James N., Judge*. Order entered 24 September 1987 in SAMPSON County District Court. Heard in the Court of Appeals 31 August 1988.

On 16 December 1978, Lucille McPherson gave birth to an illegitimate child, LaToya S. McPherson. On 6 August 1979, on complaint of Ms. McPherson defendant was charged in a warrant for willful neglect and refusal to provide adequate support for the child in violation of N.C. Gen. Stat. § 49-2. Defendant was tried on 29 November 1979 and was found not guilty, by a general verdict.

The present action was filed by Sampson County, by and through its child support enforcement agency, against defendant on 29 May 1985, seeking to have defendant adjudicated to be the father of LaToya S. McPherson. Plaintiff also sought reimbursement for public assistance paid to and on behalf of the child, payment of expenses incurred as a result of the pregnancy and birth of the child, and an order directing defendant to pay for the support and maintenance of the child. Defendant answered raising, as a first defense, plaintiff's failure to state a claim upon which relief can be granted and, as a second defense, a general denial of the allegations of the complaint. Defendant subsequently filed a motion to dismiss the complaint on 4 September 1987 on the grounds of *res judicata*. Following a hearing, the trial court granted defendant's motion and dismissed the complaint on the grounds of *res judicata*. Plaintiff appealed from the dismissal of the complaint.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith; and Sampson County Child Support Enforcement Agency, by Robert S. Griffith, II, for plaintiff-appellant.

No brief for defendant-appellee.

WELLS, Judge.

Plaintiff assigns as error the trial court's dismissal of plaintiff's complaint on the grounds of *res judicata*. "*Res judicata* deals with the effect of a former judgment in favor of a party upon a subsequent attempt by the other party to relitigate the same cause of action. . . ." *State v. Lewis*, 311 N.C. 727, 319 S.E. 2d 145 (1984) (*quoting King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973)). In *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962), our Supreme Court stated:

An estoppel by judgment arises when there has been a final judgment or decree, necessarily determining a fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit.

In September 1979, defendant in this case was arrested for allegedly violating G.S. § 49-2, which provides in part: "Any parent who willfully neglects or who refuses to provide adequate support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided." In order to be found guilty of violating G.S. § 49-2, "[T]wo essential elements must be established: First, that the defendant is a parent of the illegitimate child in question; and second, that the defendant has *willfully* neglected or refused to support such child." *State v. Hobson*, 70 N.C. App. 619, 320 S.E. 2d 319 (1984). On 29 November 1979, the district court judge returned a verdict of not guilty in the form of a general verdict in favor of defendant.

On 29 May 1985, plaintiff herein instituted the present action seeking relief pursuant to G.S. § 49-14 and § 49-15. G.S. § 49-14(a) provides in part: "The paternity of a child born out of wedlock

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may be established by civil action. . . ." Once paternity is established by civil action under G.S. § 49-14 the father may be compelled by G.S. § 49-15 to provide for reasonable support of the child. A comparison of G.S. § 49-2 and G.S. § 49-14 shows that: "[T]he issue of paternity is the entire thrust of the civil action under G.S. § 49-14, whereas the focus of the crime punishable by G.S. § 49-2 is the wilful failure to pay support for an illegitimate child, not paternity, because the statute does not make the mere begetting of a child a crime." *Stephens v. Worley*, 51 N.C. App. 553, 277 S.E. 2d 81 (1981).

In *Stephens, supra*, under facts practically indistinguishable from the facts in this case, this Court held that a general verdict of not guilty of a G.S. § 49-2 charge does not operate as *res judicata* on the issue of paternity in a subsequent G.S. § 49-14 and -15 action to establish paternity and require support of an illegitimate child. It is therefore clear that the trial court erred in allowing defendant's motion to dismiss this action on grounds of *res judicata*. The order of the trial court must be and is

Reversed.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WILLIE DARRYL HARRIS

No. 8826SC183

(Filed 4 October 1988)

Robbery § 1.2— common law robbery lesser offense of armed robbery

Defendant who was indicted and tried for armed robbery in violation of N.C.G.S. § 14-87 could properly be convicted of common law robbery as a lesser included offense.

APPEAL by defendant from *Griffin, Kenneth A., Judge*. Judgment entered 25 September 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 September 1988.

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Attorney General Thornburg, by Associate Attorney General Barbara A. Shaw, for the State.

DeVore and Mundorf, by Jon G. Mundorf, for defendant appellant.

PHILLIPS, Judge.

Indicted and tried for armed robbery in violation of G.S. 14-87 defendant was convicted of common law robbery as a lesser included offense. Relying upon the reasoning of our Supreme Court in *State v. Hurst*, 320 N.C. 589, 359 S.E. 2d 776 (1987), where it was ruled that felonious larceny is not a lesser included offense of armed robbery, defendant's only contention here is that common law robbery is not a lesser included offense of armed robbery and the court erred in charging the jury and in accepting a verdict thereon. But since *Hurst* was overruled by *State v. White*, 322 N.C. 506, 369 S.E. 2d 813 (1988), in which the Supreme Court reaffirmed its holding in *State v. Joyner*, 312 N.C. 779, 324 S.E. 2d 841 (1985) and other cases that common law robbery is a lesser included offense of armed robbery, defendant's contention must be and is overruled.

No error.

Judges EAGLES and PARKER concur.

JAMES HENDERSON v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF SOCIAL SERVICES

No. 887SC213

(Filed 18 October 1988)

Social Security and Public Welfare § 1— Medicaid disability benefits—alcoholism—denied

The Department of Human Resources' decision to deny claimant Medicaid disability benefits was not supported by substantial competent evidence and was affected by errors of law and procedure where there was evidence supporting the agency decision that claimant's exertional impairments did not preclude him from performing light work but there were no findings or conclusions as to the effect of claimant's alcoholism or the total combination of

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impairments on his residual functional capacity. Although the rule requiring consideration of nonexertional impairments in determining disability was set out *pro forma* in the Regulations section of the decision, the decision reflects little more than a mechanical straightforward application of the grids, or medical-vocational guidelines.

APPEAL by petitioner from *Frank R. Brown, Judge*. Judgment entered 9 September 1987 in Superior Court, NASH County. Heard in the Court of Appeals 31 August 1988.

Eastern Carolina Legal Services, Inc., by Patricia A. Bailey, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Catherine C. McLamb, for the State.

BECTON, Judge.

Appellant, James Henderson, appeals from a superior court judgment affirming the North Carolina Department of Human Resources' decision to deny him Medicaid disability benefits. We vacate the judgment and order the case remanded to the agency for further proceedings.

I

A. Facts

In August 1985, James Henderson, then 35 years old, complaining of chest pains, shortness of breath and weakness, was taken to the emergency room and admitted to the hospital. He was 6'2" and weighed 122 pounds at admission. Henderson was hospitalized for 13 days and was diagnosed as suffering from hyperthyroidism, supraventricular tachycardia (abnormal heart rhythm), and antral gastritis (inflammation of the stomach lining). These conditions improved with treatment. While in the hospital, Henderson applied for Supplemental Security Income disability benefits (Medicaid). He claimed to be disabled as a result of chest pains, anxiety, and pain in his back, right leg and right hip.

Additional impairments documented in the Record on Appeal include anxiety reactions, peptic ulcer disease, hypertrophic distal phalanges (bony growths) on both hands, essential hypertension, scoliosis (curvature of the spine), a probable herniated nucleus pulposus (ruptured disc), muscle spasms in the lower

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back, arthritic disease of the right thigh, borderline mental retardation (I.Q. = 75), alcoholic gastritis, and chronic alcoholism. (Henderson denied a drinking problem.)

B. Procedural History

The Nash County Department of Social Services (DSS) turned down Henderson's application for benefits, finding him "not a disabled person." Henderson appealed the DSS decision to the North Carolina Department of Human Resources (DHR), and a DHR hearing officer affirmed denial of benefits in a tentative decision. The tentative decision was affirmed on appeal to the DHR chief hearing officer and was incorporated by reference in the DHR Notice of Final Decision.

In the Final Decision, the chief hearing officer found as a fact that "[Henderson's] vocational profile corresponds to the factors cited in Vocational Rule 202.16 [relating to one's ability to work] as he is a younger individual, functionally illiterate, with a history of unskilled work and with the capacity for light work." Based on her further finding that "[t]his rule *directs* a finding of 'not disabled'" (emphasis added), the chief hearing officer concluded that Henderson was "not disabled as defined by the applicable regulations."

Henderson petitioned for judicial review in superior court. The superior court judge heard arguments and reviewed the record, but took no testimony or additional evidence. The judge affirmed the DHR Final Decision, holding that "the Hearing Officer's decision comports with all applicable state and federal statutes [and] regulations[;] . . . is supported by substantial evidence of record; and has a rational basis in the evidence." Henderson appealed to this Court.

C. Contentions on Appeal

Henderson contends that the superior court judge erred in affirming the DHR Final Decision because it was not supported by substantial evidence. Henderson claims that federal medical vocational guidelines were improperly relied upon to determine his disability status. He also contends that he is disabled under the regulations and that, as a result, there are no jobs in the national economy that he can perform. Before we address these contentions, we summarize the law applicable to this case.

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II

A. Standard of Review

The North Carolina Administrative Procedure Act (APA), codified at Chapter 150-B of the General Statutes, governs initial and appellate review of administrative agency decisions. The APA sets out the standard of review to be followed by the court charged with reviewing the agency decision (here, the superior court):

. . . [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- . . .
- (3) Made upon unlawful procedure;
 - (4) Affected by other error of law; [or]
 - (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted . . .

N.C. Gen. Stat. Sec. 150B-51(b) (1987).

The appropriate standard of review is known as the "whole record" test. See *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 344, 342 S.E. 2d 914, 919 (1986), cert. denied, 318 N.C. 507, 349 S.E. 2d 862 (1986). Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions. *Community Savings & Loan Assoc. v. North Carolina Savings and Loan Commission*, 43 N.C. App. 493, 497, 259 S.E. 2d 373, 376 (1979). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lackey v. North Carolina Dep't of Human Resources*, 306 N.C. 231, 238, 293 S.E. 2d 171, 176 (1982). The reviewing court must not consider only that evidence which supports the agency's result; it must also take into account contradictory evidence or evidence from

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which conflicting inferences could be drawn. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). Ultimately, the reviewing court must determine whether the administrative decision had a rational basis in the evidence. *Overton v. Board of Education*, 304 N.C. 312, 322, 283 S.E. 2d 495, 501 (1981).

When an appellate court reviews the decision of a lower court, however (as opposed to when it reviews an administrative agency's decision on direct appeal), the scope of review to be applied by the appellate court under Section 150B-52 of the APA is the same as it is for other civil cases. See N.C. Gen. Stat. Sec. 150B-52 (1987); N.C. R. App. P. 10(a) (1988); *American National Insurance Co. v. Ingram*, 63 N.C. App. 38, 41, 303 S.E. 2d 649, 651 (1983), cert. denied, 309 N.C. 819, 310 S.E. 2d 348 (1983). Thus, our consideration of the superior court judgment is limited to determining whether the court committed any errors of law. See *Ingram*, 63 N.C. App. at 41, 303 S.E. 2d at 651. To accomplish our task though, we must consider the "whole record" so that we may determine whether the superior court judge was correct as a matter of law in holding that the DHR Final Decision was supported by substantial evidence and complied with applicable statutes and regulations. We begin our review by examining the law governing DHR Medicaid disability decisions.

B. Medicaid Laws

Medicaid is a cooperative federal-state program through which medical assistance benefits are provided to needy disabled persons meeting certain criteria. See 42 U.S.C.A. Secs. 1381 et seq.; 42 U.S.C.A. Secs. 1396 et seq. (1983) (Supp. 1988); N.C. Gen. Stat. Secs. 108A-54 et seq. (Supp. 1988). North Carolina agencies making disability benefit determinations are required to comply with federal Medicaid statutes and regulations. N.C. Gen. Stat. Sec. 108A-56 (Supp. 1987); 42 U.S.C.A. Sec. 1396a (Supp. 1988); see *Lackey v. Dep't of Human Resources*, 306 N.C. 231, 235, 293 S.E. 2d 171, 174 (1982); *Lowe v. North Carolina Dep't of Human Resources*, 72 N.C. App. 44, 45, 323 S.E. 2d 454, 456 (1984). Although federal court decisions interpreting the applicable statutes and regulations are not binding on North Carolina courts, see *Lackey*, 306 N.C. at 236, 293 S.E. 2d at 175, in light of the paucity of North Carolina decisions on the relevant issues, we deem the well-

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reasoned federal decisions discussed herein to be persuasive authority.

C. Disability Determination

To qualify for disability benefits under federal law, a claimant must show that he is "disabled," in other words, that he is:

. . . unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months . . . [A]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is *not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy*, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C.A. Sec. 1382c(a)(3)(A), (B) (1983) (Supp. 1988) (emphasis added); *see also* 20 C.F.R. Sec. 416.905(a) (1986).

A five-step sequential evaluation process is employed to determine whether a claimant is disabled. See 20 C.F.R. Sec. 416.920 (1986); *Bowen v. Yuckert*, --- U.S. ---, 96 L.Ed. 2d 119, 126 (1987); *Hall v. Harris*, 658 F. 2d 260, 264-65 (4th Cir. 1981); *Lowe*, 72 N.C. App. at 46-47, 323 S.E. 2d at 456. In essence, the decisionmaker must determine: (1) whether the claimant is currently engaged in "substantial gainful activity." If so, the claimant is not disabled. 20 C.F.R. Sec. 416.920(b). If not, the next inquiry is, (2) whether the claimant has a "severe impairment" or combination of impairments. 20 C.F.R. Sec. 416.920(c). A severe impairment is one that significantly limits the claimant's physical or mental ability to do "basic work activities," defined in the regulations at 20 C.F.R. Sec. 416.921(b). If the claimant does not have a severe impairment or combination of impairments, he is not disabled, and the claim is denied. *Id.* If he does, the next inquiry is, (3) whether the impairment or its equivalent is listed in Appendix 1 of the regulations. 20 C.F.R. Sec. 416.920(d). Appendix 1 lists certain

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medical impairments deemed so severe as to preclude substantial gainful activity. If the impairment or its equivalent is listed, the claimant is conclusively presumed to be disabled. *Id.* If not, the next inquiry is, (4) whether the severe impairment prevents the claimant from performing work he performed in the past. 20 C.F.R. Sec. 416.920(e). If he still can do his former work, he is not disabled. *Id.* If he cannot, the last inquiry is, (5) whether the claimant is able to perform other work existing in the national economy in light of his "residual functional capacity" (or remaining capabilities given his physical, mental, and other limitations, *see* 20 C.F.R. Sec. 416.945), and his age, education, and past work experience. 20 C.F.R. Sec. 416.920(f). If the claimant is able to perform other work, he is "not disabled." *Id.* In appropriate circumstances, the medical-vocational guidelines found in Appendix 2 of the regulations direct the answer to this inquiry. *See* 20 C.F.R. Part 404, Subpart P, App. 2.

A claimant establishes a *prima facie* case of disability if he satisfies steps (3) or (4). The burden then shifts to the agency to show that the claimant can perform alternative work existing in the national economy under step (5). *See Lackey*, 306 N.C. at 243, 293 S.E. 2d at 179; *Hall*, 658 F. 2d at 264. In the case before us, the chief hearing officer found, under step (1), that Henderson was not engaged in substantial gainful activity; under step (2), that Henderson did have severe impairments of "back and leg pain" and "borderline intelligence"; under step (3), that these severe impairments did not meet the listings in Appendix 1; and under step (4), that Henderson could not return to past work "because the physical exertion required exceeds his capacity."

The parties concede that Henderson met his burden of proof in establishing disability. The question for our consideration is whether DHR met the requirements of step (5), that is, whether it showed that, despite his impairments, Henderson could nonetheless perform work existing in the national economy.

III

Henderson first asserts that the agency improperly used the Appendix 2 medical-vocational guidelines to determine that he was not disabled. For the reasons set out below, we agree.

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A. Medical-Vocational Guidelines ("Grids")

The medical-vocational guidelines, commonly referred to as "grids," distill and consolidate long-standing medical evaluation policies employed in disability determinations. *See Heckler v. Campbell*, 461 U.S. 458, 461, 76 L.Ed. 2d 66, 71 (1983). They are designed to reduce or eliminate the need for vocational expert testimony, thereby enhancing uniformity, accelerating the benefit-determination process, and making efficient use of scarce state resources. *See id.*

The grids act as a form of administrative notice that a significant number of unskilled jobs exist in the national economy for persons having a particular combination of attributes. *See* 20 C.F.R. Part 404, Subpart P, App. 2, Sec. 200.00(b) (1986). They identify job requirements, interrelate a claimant's physical ability with his age, education and previous work experience, and direct a conclusion whether work exists that the claimant could perform. If such work exists, the claimant is determined to be "not disabled." 20 C.F.R. Secs. 416.960-969 (1986). There are three tables of grids, classified by level of work activity (sedentary, light, and medium). The claimant's residual functional capacity for physical exertion alone determines which set of grids applies.

Because the grids are predicated on physical strength limitations ("exertional impairments"), conclusive reliance on grids is inappropriate when a claimant's residual functional capacity is diminished by a "nonexertional impairment." 20 C.F.R. Part 404, Subpart P, App. 2, Sec. 200.00(e) (1986); *Harvey v. Heckler*, 814 F. 2d 162, 164 (4th Cir. 1987); *Hall*, 658 F. 2d at 265; *see generally, Heckler v. Campbell*, 461 U.S. at 462, 76 L.Ed. 2d at 71. The rationale is that a narrower range of appropriate jobs is available to a claimant with nonexertional impairments than the grids would indicate. *Smith v. Schweiker*, 719 F. 2d 723, 725 (4th Cir. 1984).

The regulations provide that full individualized consideration of all relevant facts must be given when a claimant's impairments are solely nonexertional, or are a combination of exertional and nonexertional. 20 C.F.R. Part 404, Subpart P, App. 2, Sec. 200.00(e) (1986); *see Grant v. Schweiker*, 699 F. 2d 189, 192 (4th Cir. 1983). Thus, to the extent that the combination of exertional and nonexertional impairments further limits the range of jobs available to a claimant, DHR may not conclusively rely on the

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grids to determine the existence of alternative work. Instead, the agency must produce vocational expert testimony to show that the claimant retains the capacity to perform specific jobs existing in significant numbers in the national economy. *See Grant*, 699 F. 2d at 192; *McCrea v. Heckler*, 580 F. Supp. 1106, 1110 (W.D.N.C. 1984).

Whether a claimant's nonexertional limitation affects his capacity to perform certain job activities is a question of fact. *Smith*, 719 F. 2d at 725. When evidence of nonexertional impairments is presented, the agency must make specific findings as to the existence of those impairments, and must explicitly evaluate their effect on the claimant's ability to perform jobs he is otherwise exertionally capable of performing. *See id.* Only if the nonexertional impairment is found not to affect the claimant's ability to work is conclusive use of the grids proper. *See id.*

B. Exertional Impairments

The administrative record reveals that Henderson suffered exertional limitations associated with his back, hip, and leg. The chief hearing officer concluded that despite these exertional limitations, Henderson could still perform "light work" as defined in the regulations. Although our review discloses sharply conflicting evidence as to Henderson's ability to perform light work, we are mindful that the whole record test is not a tool of judicial intrusion, and that we are not permitted to replace the agency's judgment with our own even though we might rationally justify reaching a different conclusion. *See Thompson*, 292 N.C. at 410, 233 S.E. 2d at 541. We hold that there is a rational basis in the evidence for concluding that Henderson's exertional impairments do not preclude him from performing light work, and therefore that this part of the agency's decision was supported by substantial evidence.

C. Nonexertional Impairments

Our review of the record reveals substantial evidence that Henderson also had, among others, the following significant non-exertional impairments: recurrent pain; borderline mental retardation; and chronic alcoholism and related conditions. Henderson contends on appeal that the agency improperly relied on the grids because it failed first to fully consider and make findings of fact

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regarding his nonexertional impairments of borderline intelligence and alcoholism. We summarily conclude that the findings regarding Henderson's borderline intelligence were sufficient. However, we agree that DHR's failure sufficiently to consider Henderson's nonexertional impairment of alcoholism precluded application of the grids.

Alcoholism is recognized as a nonexertional impairment that may be so disabling as to preclude substantial gainful employment. See *Williams v. Bowen*, 844 F. 2d 748, 757-58 (10th Cir. 1988); *Ray v. Bowen*, 843 F. 2d 998, 1005 (7th Cir. 1988); *Hicks v. Califano*, 600 F. 2d 1048, 1051 (4th Cir. 1979). When evidence of alcoholism is presented, the agency must make an individualized determination; straightforward application of the grids is not appropriate. See *Williams*, 844 F. 2d at 760; *Kellar v. Bowen*, 848 F. 2d 121, 124-25 (9th Cir. 1988); *Murphy v. Heckler*, 613 F. Supp. 1233, 1234 (W.D. Pa. 1985); *McCrea v. Heckler*, 580 F. Supp. 1106, 1110 (W.D.N.C. 1984). Findings must be made as to whether the claimant is addicted to alcohol, has lost the ability to control its use, and is prevented by alcohol use from obtaining and maintaining employment. See *Ferguson v. Heckler*, 750 F. 2d 503, 505 (5th Cir. 1985); *Kellar*, 848 F. 2d at 124; *Hicks*, 600 F. 2d at 1051. Failure to make these inquiries warrants remand to the agency. See *Hicks*, 600 F. 2d at 1051; accord *Kellar*, 848 F. 2d at 123.

The only reference to Henderson's alcoholism by the chief hearing officer is found in a section of the Final Decision entitled "Evaluation of the Evidence." In that section, she summarized the report of one of Henderson's physicians, stating: "A history of alcohol use was given with related delirium tremors and withdrawal seizures. [Henderson] claimed abstinence for 5 months, and there were no signs of inebriation on exam." However, the chief hearing officer failed to discuss—and apparently failed to consider—the following statements made by the physician in the same report:

Of specific note, despite the claimant's indication that he has not been drinking for 5 months, Dr. Johnson . . . noted on his medical evaluation [one month ago] that the claimant was inebriated and unkempt at that time. Diagnosis at that time was for alcoholism with alcoholic gastritis

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. . . Claimant does note that he has legal difficulties in terms of being placed in jail on multiple occasions for "public drunkenness."

. . . Mr. Henderson . . . appears to [have] a long history of alcohol abuse and dependency [T]here is indeed some question as to the claimant's [reliability] as to the accuracy of his drinking behavior.

. . . [T]he most likely diagnosis at this time is for alcohol abuse and dependence, episodic.

. . . Thus, from a psychiatric point of view, any level of disability would be related directly to the effects of alcohol on his system, as well as his other medical difficulties with arthritis, hyperthyroidism, essential hypertension and the sequelae of alcoholism, such as the current gastritis and peptic ulcer disease.

Henderson's chronic alcoholism is documented in other medical reports in the record as well. An agency decision must be based on a consideration of *all* relevant evidence in the record; the agency may not select only that evidence favoring its ultimate conclusion. *See Ray*, 843 F. 2d at 1002; *accord Thompson*, 292 N.C. at 410, 233 S.E. 2d at 541. Furthermore, although it is true that Henderson denied drinking, a claimant's denial of alcohol use is not alone determinative of whether his ability to work is diminished by alcoholism. *See Kellar*, 848 F. 2d at 124 (noting propensity of alcoholics to deny drinking) (citations omitted).

The hearing officer at the first state-level hearing did make the following finding, later incorporated in the Final Decision, regarding Henderson's alcoholism:

3. The objective medical evidence reveals:

. . .

- e. That claimant had a history of alcohol abuse. His weight is stable and laboratory studies have revealed no significant abnormalities to indicate malnutrition or liver dysfunction. He had been diagnosed with anxiety reaction.

Considering the applicable regulations, we conclude that this finding relates only to step (3) of the evaluation process, address-

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ing only whether Henderson's alcoholism met the listings in Appendix 1 which conclusively establishes disability. This is evident in light of the hearing officer's conclusion "[t]hat the impairments described in the above findings of fact do not meet or equal the level of severity described in . . . [section] 12.09" of Appendix 1. Section 12.09 addresses substance addiction disorders, including alcoholism, and provides that "[t]he level of severity for these disorders is met when" a severe secondary condition independently listed in Appendix 1 exists, specifically, anxiety disorder, liver damage, or gastritis leading to malnutrition. 20 C.F.R. Part 404, Subpart P, App. 1, Sec. 12.09 (1986). We hold that this finding is insufficient to demonstrate a proper evaluation, required under step (5), of the effect of Henderson's alcoholism on his residual functional capacity.

In our view the grids were conclusively relied upon to find Henderson not disabled. No findings or conclusions were made as to the effect of Henderson's alcoholism—or the total combination of impairments—on his residual functional capacity. Although the rule requiring consideration of nonexertional impairments in determining disability was set out *pro forma* in the "Regulations" section of the decision, the decision reflects little more than a mechanical, straightforward application of the grids. We conclude that DHR did not satisfy the requirements of step (5) because it failed to fully consider Henderson's documented nonexertional impairment of chronic alcoholism and to determine whether that alcoholism diminished his residual functional capacity to perform a full range of light work. DHR erred by conclusively applying the grids without first making the necessary specific findings. DHR's decision, therefore, was not supported by substantial competent evidence and was affected by errors of law and improper procedure.

On remand we direct DHR to consider the combination of Henderson's impairments, both exertional and nonexertional, and to make specific findings as to whether all of Henderson's impairments combined affect his ability to work and diminish the universe of jobs available to him. Additionally, we instruct DHR that if the combination of exertional and nonexertional impairments makes application of the grids inappropriate to Henderson, DHR must produce vocational expert testimony regarding "substantial gainful work"—i.e., specific jobs—existing in the national econ-

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omy available to Mr. Henderson given his residual functional capacity.

IV

Henderson next contends that he does not have the residual functional capacity to perform any jobs in the national economy, and therefore that the DHR conclusion that alternative work exists for him was not supported by substantial evidence. In light of our instructions to DHR, we decline to decide whether Henderson has the residual capacity to perform any jobs existing in the national economy. That is a decision for the agency to make on remand.

V

We hold that the decision of the Department of Human Resources was affected by error of law and made upon unlawful procedure. We further hold that the decision, that Henderson was not disabled as directed by the grids, was not supported by substantial, competent evidence. We vacate the judgment of the superior court and direct the court to remand the case to the Department of Human Resources for additional proceedings consistent with this opinion.

Vacated and remanded.

Judges WELLS and PHILLIPS concur.

CHESAPEAKE MICROFILM, INC. v. EASTERN MICROFILM SALES AND SERVICE, INC., AND DAVID WRIGHT

No. 8821SC227

(Filed 18 October 1988)

1. Fraud § 9 – 12(b)(6) dismissal of counterclaim for fraud – no error

The trial court did not err by dismissing defendants' amended counterclaim under N.C.G.S. § 1A-1, Rule 12(b)(6) where defendants alleged fraud but did not allege misrepresentation or concealment in Count I and failed to be particular about their assertions of fraud in Count II.

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2. Unfair Competition § 1— counterclaim dismissed—no error

The trial court did not err by dismissing defendants' counterclaim for unfair and deceptive trade practices under N.C.G.S. § 1A-1, Rule 12(b)(6) where the thrust of defendants' claim in Count I was that plaintiff submitted low bids for contracts and then later overcharged its customers, which provides no cause of action under N.C.G.S. § 75-1.1, and defendants in Count II alleged that plaintiff had engaged in an ostensible effort to sell plaintiff corporation to defendants for the purpose of hindering and delaying defendants' opening of a business in Winston-Salem, North Carolina and preventing defendants from bidding upon a lucrative contract which ultimately went to plaintiff. Defendants are in essence asking that plaintiff be subject to the risk of treble damages for continuing to conduct business during the negotiation process for plaintiff's sale.

APPEAL by defendants from *D. Marsh McLellan, Judge*. Order entered 12 October 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 August 1988.

Moore and Brown by B. Ervin Brown, II, for plaintiff-appellee.

David E. Wright, pro se, for defendant-appellants.

BECTON, Judge.

This appeal is from an order dismissing the amended counterclaim of defendants David Wright and Eastern Microfilm Sales and Service, Inc., under N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 12(b)(6) (1983) for failure to state a claim upon which relief can be granted. We affirm the trial court's dismissal of defendants' amended counterclaim.

I

Defendant Eastern Microfilm (Eastern) is a Virginia corporation with offices located in Bassett, Virginia. Defendant Wright is Eastern's principal stockholder and its president. Plaintiff, Chesapeake Microfilm, Inc. (Chesapeake), is a North Carolina corporation whose president and sole stockholder is Ronnie Cox. Both businesses perform microfilming services for customers drawn from approximately the same geographic area.

In September 1986, Chesapeake filed suit against Wright and Eastern. Defendants counterclaimed, and, following an initial dismissal under Rule 12(b)(6), they filed an amended counterclaim on 31 August 1987.

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Defendants alleged in count one of their amended counterclaim that Chesapeake, beginning in 1978, carried on a "fraudulent scheme" by submitting low bids for microfilming contracts, winning those contracts, and then overcharging the customers when it performed its services. These "fraudulent and deceptive practices," defendants averred, allowed Chesapeake to "[obtain] some of Eastern's customers and [to obtain] contracts which Eastern had bid upon." Defendants claimed to have lost \$120,000 per year in gross revenues and alleged \$15,000 to \$20,000 in annual lost profits from 1978 until the commencement of the lawsuit.

Count two of the counterclaim stated that in December 1985, Cox contacted Wright "in an ostensible effort to sell [Chesapeake] to Wright." Defendants charged that Cox invited negotiations about the purchase because Cox had learned of Wright's interest "in expanding Eastern's operation in North Carolina and . . . that Wright and/or Eastern might be opening a business in Forsyth [County]." Count two averred that during the course of the negotiations, Cox concealed "the true condition of the accounts and books of Chesapeake" and the existence of "serious pending claims against Chesapeake, which . . . would have fallen upon Eastern to pay had Eastern purchased Chesapeake." In addition, defendants claimed that Cox "reneged on the key ingredient of the contract [for the purchase of Chesapeake]," an ingredient apparently involving an "indefinite purchase price formula." The gist of count two was that Cox used the negotiations as a ruse "to hinder and delay Wright and Eastern from opening a business in the Winston-Salem, North Carolina, area" and to prevent defendants from bidding upon "an extremely lucrative" microfilming contract which ultimately went to Chesapeake. Defendants cited the lawsuit as an additional device employed by Cox to impede defendants' entry into the North Carolina market.

Both counts of the amended counterclaim charged that Cox had perpetrated fraud and had engaged in unfair and deceptive trade practices in violation of N.C. Gen. Stat. ch. 75 (1985). The trial court dismissed defendants' amended counterclaim following a second 12(b)(6) motion by plaintiff. We now are asked to determine whether the trial court properly ruled that the amended counterclaim stated no claim upon which relief could have been granted.

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II

[1] An inquiry into the sufficiency of a counterclaim to withstand a motion to dismiss under Rule 12(b)(6) is identical to that regarding the sufficiency of a complaint to survive the same motion. *See Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E. 2d 907, 909 (1984), *rev'd on other grounds*, 313 N.C. 565, 330 S.E. 2d 600 (1985). For purposes of a motion to dismiss, defendants' allegations in the counterclaim must be treated as true. *See, e.g., Jenkins v. Wheeler*, 69 N.C. App. 140, 142, 316 S.E. 2d 354, 356 (1984), *disc. rev. denied*, 311 N.C. 758, 321 S.E. 2d 136 (1984). Finally, the counterclaim "must state enough to satisfy the requirements of the substantive law giving rise to the claim." *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 86, 334 S.E. 2d 404, 406 (1985). Within this framework, we turn first to defendants' assertion on appeal that the amended counterclaim states a cause of action for fraud.

A. Fraud: Count I

To make out their claim of actual fraud, the defendants must have alleged with particularity: 1) that plaintiff made a false representation or concealment of a material fact; 2) that the representation or concealment was reasonably calculated to deceive defendants; 3) that plaintiff intended to deceive them; 4) that defendants were deceived; and 5) that defendants suffered damage resulting from plaintiff's misrepresentation or concealment. *See, e.g., Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981). Count one alleges neither misrepresentation nor concealment on the part of plaintiff. Defendants failed, in other words, to offer the first ingredient necessary to a fraud charge, and thus we conclude, without further discussion, that count one states no cause of action for fraud.

B. Fraud: Count II

Allegations of fraud are subject to more exacting pleading requirements than are generally demanded by "our liberal rules of notice pleading." *Stanford v. Owens*, 76 N.C. App. 284, 289, 332 S.E. 2d 730, 733, *disc. rev. denied*, 314 N.C. 670, 336 S.E. 2d 402 (1985) (citations omitted). Rule 9(b) of the North Carolina Rules of Civil Procedure provides in relevant part that:

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(b) . . . In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 9(b) (1983). In *Terry*, our Supreme Court instructed that "in pleading actual fraud the particularity requirement is met by alleging time, place, and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent act or representation." 302 N.C. at 85, 273 S.E. 2d at 678. *Terry's* formula ensures that the requisite elements of fraud will be pleaded with the specificity required by Rule 9(b).

In our view, count two of the amended counterclaim fails to make out a claim for fraud under the *Terry* test. The allegations of count two are notably anemic concerning the content of the fraudulent statements attributed to plaintiff. For example, defendants' assertion that Cox concealed facts about Chesapeake's financial condition is framed thus:

17. During the course of the aforesaid negotiations, Cox, acting for himself and on behalf of Chesapeake, made false and material misrepresentations to Eastern and to Wright, which said misrepresentations included false statements of material facts and intentional omissions of material facts, which said false statements and omissions had as their purpose concealing the true condition of the accounts and books of Chesapeake.

Defendants alleged the elements of false representation and concealment of material fact in general terms; they pleaded no facts which, if true, would have constituted fraudulent concealment by Cox of the financial condition of Chesapeake. See *Eastern Steel Products Corp. v. Chestnutt*, 252 N.C. 269, 276, 113 S.E. 2d 587, 593 (1960). Consequently, defendants' allegation about the books and records does not satisfy the particularity requirement of Rule 9(b).

Defendants failed also, in count two, to be particular about their other assertions of fraud. They did not identify the "serious pending claims" against Chesapeake that Cox allegedly concealed from Wright. They charged that Cox "reneged on the key ingre-

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dient on the contract" without explaining how Cox reneged, and without explaining how—or whether—Cox's action amounted to fraud. In short, defendants "failed to allege precisely any facts to support [their] bare allegations" of fraud. *Beasley v. National Savings Life Insurance Co.*, 75 N.C. App. 104, 108, 330 S.E. 2d 207, 209 (1985), *rev. dismissed*, 316 N.C. 372, 341 S.E. 2d 338 (1986). Instead, defendants offered only generalities and conclusory allegations, and count two, therefore, lacked the necessary particularity to allow defendants to proceed under a fraud theory. *See Moore v. Wachovia Bank and Trust Co.*, 30 N.C. App. 390, 391, 226 S.E. 2d 833, 834-35 (1976).

III

[2] We now turn to defendants' contention that the amended counterclaim stated a claim for relief under N.C. Gen. Stat. ch. 75 (1985). Section 75-1.1 of that chapter provides in part that:

- (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
- (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

N.C. Gen. Stat. Sec. 75-1.1 (1985). As we did with their allegations of fraud, we will examine each count of defendants' counterclaim and determine whether either one states a claim for unfair or deceptive trade practices.

A. Chapter 75: Count I

This Court has recognized that the provisions of Section 75-1.1 apply to disputes between business competitors. *Harrington Manufacturing Company v. Powell Manufacturing Company*, 38 N.C. App. 393, 396, 248 S.E. 2d 739, 741-42 (1978), *disc. rev. denied and cert. denied*, 296 N.C. 411, 251 S.E. 2d 469 (1979). However, we have never viewed the statute as being so broad as to cover every form of business activity. *See Olivetti Corp. v. Ames Business Systems, Inc.*, 81 N.C. App. 1, 22, 344 S.E. 2d 82, 94 (1986), *aff'd in part, rev'd in part on other grounds*, 319 N.C. 534, 356 S.E. 2d 578 (1987). The thrust of defendants' claim in

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count one is that Chesapeake submitted low bids for contracts and then later overcharged its customers. Defendants alleged injury because Chesapeake secured contracts that defendants also made bids on and because plaintiff lured away some of defendants' customers with its seemingly-lower fees.

The activity complained of provides no cause of action to defendants under Section 75-1.1. In our view, the statute is not so inclusive as to permit one competitor to claim unfair or deceptive trade practices on the ground that another competitor successfully bid for a contract. Assuming defendants' allegations to be true, the *customers* of Chesapeake, if anyone, would appear to have a claim under Section 75-1.1. Such speculation is, however, irrelevant to our inquiry. Of relevance is the fact that the averments of count one do not state, for these defendants, any claim for unfair or deceptive trade practices.

B. Chapter 75: Count II

Likewise, we do not find a cause of action under Section 75-1.1 in count two of the amended counterclaim. Our Supreme Court discussed unfair and deceptive conduct in *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981):

Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers A practice is deceptive if it has the tendency or capacity to deceive

Id. at 548, 276 S.E. 2d at 403 (citations omitted). In *Olivetti*, this Court, in an inquiry into the range of business activity encompassed by Section 75-1.1, cited the legislative intent expressed in the original enactment of subsection (b):

The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

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81 N.C. App. at 22, 344 S.E. 2d at 94 (emphasis omitted) (quoting N.C. Gen. Stat. Sec. 75-1.1 (1975)).

Although we recognize that the statutory proscription against unfair or deceptive trade practices applies to competitors, neither the language of *Miller* nor the legislative intent quoted by *Olivetti* suggest that Section 75-1.1 reaches the claims made by defendants. Defendants, in essence, are asking that plaintiff be subject to the risk of treble damages for continuing to conduct business during the negotiation process for Chesapeake's sale. See N.C. Gen. Stat. Sec. 75-16 (1985). Were we to apply the statute to the activity articulated in count two, we would be extending Section 75-1.1 into virtually all aspects of business conduct. We hold, therefore, that the activity complained of in count two of defendants' counterclaim does not state a cause of action for unfair or deceptive trade practice.

IV

The order of the trial court dismissing defendants' amended counterclaim for failure to state a claim for which relief can be granted is

Affirmed.

Judges WELLS and PHILLIPS concur.

CATO EQUIPMENT COMPANY, INC. v. VERNON MATTHEWS v. JOHN DEERE COMPANY

No. 8823DC298

(Filed 18 October 1988)

1. Sales §§ 6.1, 22.1— breach of implied warranty of merchantability— unopened crates— not products liability action— seller not protected

In an action by plaintiff for recovery of the purchase price of a crankshaft with a counterclaim by defendant based on implied warranty of merchantability where defendant received a crankshaft ordered through plaintiff in crates that were opened only by defendant, N.C.G.S. § 99B-2(a) did not apply because a products liability action is brought for personal injury, death or property damage, and there was neither property damage nor personal injury here.

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2. Uniform Commercial Code § 20— defective crankshaft—action for purchase price—counterclaim for breach of implied warranties—revocation of acceptance

In an action for recovery of the purchase price of a crankshaft with a counterclaim by defendant based on implied warranties, the trial court did not err by concluding that plaintiff had breached its implied warranties of fitness and allowing a setoff by defendant of the purchase price, determining by implication that defendant had revoked his acceptance and was entitled to damages for the defective crankshaft, where the court determined that the crankshaft was cracked when defendant installed it in the engine and that the crack caused damage to the rod bearing. It is apparent that the cracks were impossible to discover prior to their use in the engine. N.C.G.S. § 25-2-316 (3)(b), N.C.G.S. § 25-2-608(1)(b).

3. Uniform Commercial Code § 20— defective crankshaft—breach of implied warranty—evidence sufficient

In an action to recover the purchase price of a crankshaft with a counter-claim for breach of the implied warranties of merchantability and fitness for a particular purpose in which the judge found that plaintiff had breached its implied warranties and allowed defendant a setoff against plaintiff's complaint, there was sufficient evidence upon which the trial court made its findings of fact and its judgment. Although the record is not entirely clear on when defendant knew of the cracks in the crankshaft, once the crankshaft was installed without the knowledge that it was defective, it is irrelevant when the crack was subsequently discovered.

4. Evidence § 40— nonexpert opinion testimony—no findings concerning qualifications—no error

The trial court did not improperly allow opinion testimony by defendant even though the court did not make specific findings about defendant's qualifications as an expert where plaintiff made no request for findings and the court itself was asking for defendant's opinion. N.C.G.S. § 8C-1, Rule 702.

APPEAL by plaintiff from *Osborne, Judge*. Judgment entered 7 October 1987 in District Court, YADKIN County. Heard in the Court of Appeals 13 September 1988.

In May of 1985, defendant ordered a crankshaft through plaintiff from the John Deere Company. He ordered the crankshaft and various related parts in order to rebuild a tractor engine owned by Charles Wooten. The parts were delivered to plaintiff and defendant picked them up without plaintiff ever uncrating them.

Defendant rebuilt the engine, but after only 35 hours of use it developed a knocking sound. He disassembled the engine and found that one of the rod bearings was extensively damaged as well as the crankshaft.

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Defendant initially thought that he had received a crankshaft that was too small in diameter, thus causing the damage. He returned the crankshaft to plaintiff stating that it was too small. Plaintiff assured defendant that if the part were defective, John Deere would stand behind its product. Only after these assurances did defendant order a second crankshaft in January of 1986.

Plaintiff had the diameter of the crankshaft measured and found it to be the correct size. He returned the part to defendant telling him that it was not undersized. Defendant then noticed a crack in the crankshaft and determined that this was the cause of the bearing damage. Plaintiff claimed that the bearing and crankshaft damage was oil related.

Defendant was billed for the parts ordered in January of 1986 and when he refused to pay, plaintiff brought this civil action for the purchase price. Defendant answered and counter-claimed for an alleged breach of the implied warranty of merchantability and fitness for a particular purpose. He also filed a third party complaint against the John Deere Company which the trial court dismissed.

The case was tried in Yadkin County District Court on 5 October 1987, without a jury. The judge made findings of fact that plaintiff had breached its implied warranties and allowed defendant a setoff against the complaint of the plaintiff. From the findings of fact and judgment of the trial court, plaintiff appeals.

Daniel J. Park for plaintiff appellant.

Zachary and Zachary, by Walter L. Zachary, Jr., for defendant appellee.

ARNOLD, Judge.

[1] Plaintiff first contends that because the parts were received by defendant in sealed crates that plaintiff never opened, under Chapter 99B he breached no implied warranties. We disagree.

G.S. 99B-2(a) states that "[N]o product liability action, except an action for breach of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container . . . unless the seller damaged or mishandled the product while in his possession

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. . . ." Defendant did receive a crankshaft ordered through plaintiff in crates that were opened only by defendant. However, this action by plaintiff is not covered under Chapter 99B.

A products liability action is "any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture . . . of any product." G.S. 99B-1(3). This action by plaintiff is for recovery of the purchase price of the crankshaft with a counterclaim by defendant based on implied warranties. There was neither property damage nor personal injury here and Chapter 99B does not apply. *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E. 2d 495, 498 (1987).

[2] Plaintiff next contends that under the Uniform Commercial Code (U.C.C.) he breached no implied warranties. We disagree.

The U.C.C. as adopted in North Carolina provides that "[u]nless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." G.S. 25-2-314(1). Plaintiff claims that any implied warranty is excluded under U.C.C. § 2-316(3)(b) which states that "when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him" G.S. 25-2-316(3)(b).

Defendant did not examine the crankshaft before he ordered it through plaintiff, nor did he refuse to do so. The Official Comment to the U.C.C. states that in order to bring a transaction within the scope of "refused to examine" in § 2-316(3)(b), it is not sufficient that the goods are available for inspection; there must be a demand by the seller that the buyer examine the goods fully. G.S. 25-2-316(3)(b) (Official Comment, No. 8).

Under U.C.C. § 2-608, a buyer,

may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it . . . without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

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G.S. 25-2-608(1)(b). The trial court found that cracks existed in the crankshaft at the time defendant received it. It also concluded that the plaintiff had breached its implied warranties to defendant and allowed a setoff by defendant of the purchase price. By implication, the trial court determined that defendant revoked his acceptance and was entitled to damages for the defective crankshaft.

In order for a buyer to show that his revocation was justifiable, the following four elements must be proved: (1) that the goods contained a nonconformity that substantially impaired their value to him; (2) that he either accepted the goods knowing of the nonconformity but reasonably assuming that it would be cured, or that he accepted the goods not knowing of the nonconformity due to the difficulty of the discovery or reasonable assurances from the seller that the goods were conforming; (3) that revocation occurred within a reasonable time after he discovered or should have discovered the defect; and (4) that he has notified the seller of his revocation. *Harrington Mfg. Co., Inc. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E. 2d 282, cert. denied, 297 N.C. 454, 256 S.E. 2d 806 (1979); *Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 317 S.E. 2d 5 (1984).

The trial court determined that the crankshaft was cracked when defendant installed it in the engine. It also found that the crack caused damage to the rod bearing. Obviously a crankshaft which was cracked and caused damage to other parts of the engine substantially impaired its value to defendant.

From the record and the trial court's findings of fact, it is apparent that the cracks were impossible to discover prior to their use in the engine. Only when the crankshaft was removed from the engine and cleaned up did defendant discover the cracks.

What is a reasonable time for a buyer to revoke his acceptance is ordinarily a question of fact for the jury. *Harrington Mfg.*, 40 N.C. App. 496, 253 S.E. 2d 282. In determining what is a reasonable time, it is proper to consider all the surrounding circumstances, including the nature of the defect, the complexity of the goods involved, the sophistication of the buyer, and the difficulty of the discovery. *Id.*

Defendant was not able to discover the hairline cracks in the crankshaft until after its use in the engine when they became

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more severe and apparent. Apparently, Mr. Wooten used the tractor only sparingly and it was several months before the cracks caused the damage to the bearings. There was no unreasonable delay in defendant's revocation.

Defendant notified plaintiff of his revocation as soon as he learned of the damage to the crankshaft and bearings. He ordered a new crankshaft under the impression that John Deere would replace the first crankshaft if it were defective.

Under G.S. 25-2-608(3), a buyer who revokes his acceptance has the same rights and duties with regard to the goods involved as if he had rejected them. See *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972). The measure of damages for breach of warranty is the difference at the time of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. G.S. 25-2-714(2). The crankshaft had no value as delivered and the damages were the purchase price. We find error neither in the trial court's implicit determination of revocation and damages, nor in its setoff of defendant's damages against the purchase price owed to plaintiff.

[3] Plaintiff contends that the verdict by the trial court was not supported by the greater weight of the evidence. We do not agree.

Pursuant to Rule 38(d) of the North Carolina Rules of Civil Procedure the parties waived the right of trial by jury. G.S. 1A-1, Rule 38(d). When trial by jury is waived and issues of fact are tried by the court, those findings of fact have, "the force and effect of a verdict by the jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Knutten v. Cofield*, 273 N.C. 355, 359, 160 S.E. 2d 29, 33 (1968). As both judge and jury, the trial judge passes upon the credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn therefrom. *Knutten*, 273 N.C. at 359, 160 S.E. 2d at 33. In the case at bar, there is sufficient evidence upon which the trial court made its findings of fact and judgment; this Court will not attempt to review those findings.

Plaintiff contends that the trial court may have misunderstood some of the facts in its findings. More particularly, it con-

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tends that defendant did not know of the cracks in the crankshaft until after presenting it to plaintiff claiming it was too small. The record is not entirely clear on this point; however, once the crankshaft was installed without the knowledge that it was defective, it is irrelevant when the crack was subsequently discovered.

[4] Lastly, plaintiff asserts that the trial court improperly allowed opinion testimony by defendant. Under Rule 702 of the North Carolina Rules of Evidence, knowledge, skill, experience, training or education may qualify one as an expert. G.S. 8C-1, Rule 702.

The court itself questioned defendant about his experience in tractor repair, but did not make specific findings concerning the qualifications of defendant as an expert during the trial. On this issue, the North Carolina Supreme Court stated:

[I]n the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show a specific finding on this matter, the finding being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness.

State v. Bullard, 312 N.C. 129, 143-144, 322 S.E. 2d 370, 378 (1984), quoting *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969).

Plaintiff made no request at the trial for a finding as to the qualification of the defendant as an expert. The court itself was asking for the opinion of the defendant, implicitly admitting him as an expert.

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

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TAURUS TEXTILES, INC., PLAINTIFF v. JOHN M. FULMER CO., INC., DEFENDANT

No. 8822SC316

(Filed 18 October 1988)

1. Process § 14.3— California corporation—subject to personal jurisdiction

Defendant California corporation was subject to personal jurisdiction in North Carolina under N.C.G.S. § 1-75.4(5)(b) where plaintiff performed services for defendant within this state by manufacturing certain textiles and the record indicates that defendant was well aware that the textiles were to be manufactured by plaintiff in North Carolina.

2. Process § 14.4— California corporation—insufficient minimum contacts

Defendant California corporation had insufficient minimum contacts to satisfy due process requirements where defendant contracted in California for the sale of textiles which were to be manufactured in North Carolina, shipped to South Carolina for finishing, and then shipped to defendant in California; defendant did not expressly submit to personal jurisdiction under the contracts or invoices; the arbitration term in the contracts and invoices provided that defendant was subject to personal jurisdiction in Buncombe County for the purpose of arbitration, but plaintiff chose to bring suit in Iredell County rather than arbitrating the dispute; there were no copies of the purchase orders in the record; the chargeback invoices were not a basis for personal jurisdiction, especially since there was evidence that the invoices were copies given to factors for deductions made outside North Carolina; and letters and telephone calls concerning the dispute between the parties are not grounds for jurisdiction.

APPEAL by plaintiff from *Helms (William H.), Judge*. Order entered 9 December 1987 in Superior Court, IREDELL County. Heard in the Court of Appeals 13 September 1988.

Plaintiff Taurus Textiles, Inc. instituted this action against defendant John M. Fulmer Co., Inc. to recover improper "charge-backs" from sales of textiles taken against plaintiff by defendant in the amount of \$62,514.26. Defendant moved to dismiss the action for lack of personal jurisdiction, and the trial court granted defendant's motion.

Evidence in the record tends to show the following facts. Plaintiff is a North Carolina corporation engaged in manufacturing textiles. Defendant is a California corporation with its only office located in Los Angeles, California. John M. Fulmer, the president of defendant, submitted an affidavit stating that: 1) defendant has never done business in North Carolina; 2) defendant

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has never purchased, sold or delivered goods in North Carolina, nor advertised or solicited business in North Carolina; 3) defendant has not entered into any contracts in North Carolina; 4) no officers, employees or agents of defendant have ever worked or been in North Carolina on business; and 5) defendant has never purchased any goods directly from plaintiff in North Carolina or anywhere else and that the purchase of any goods manufactured by plaintiff was conducted through local sales representatives of Blue Ridge Fabrics, Inc. in California.

Jerry Carr, the president and chief executive officer of plaintiff, submitted an affidavit in which he stated: 1) Blue Ridge Fabrics, Inc. was plaintiff's sales agent and received commissions; 2) that he went to California in the summer of 1985 to discuss "a continuing arrangement pursuant to which defendant promised to order and purchase certain textiles from plaintiff, manufactured to defendant's specifications"; 3) plaintiff manufactured and shipped textiles to defendant; 4) defendant directed numerous purchase orders to Blue Ridge Fabrics in Asheville, North Carolina; 5) defendant placed a number of telephone calls to plaintiff and Blue Ridge Fabrics in Statesville, North Carolina "to discuss the ongoing business relationship"; 6) defendant wrote letters "arising from the business relationship between plaintiff and defendant" to plaintiff and Blue Ridge Fabrics; 7) "[b]y signing some contracts, and failing to object to the terms of others, defendant submitted to jurisdiction in North Carolina"; 8) defendant directed its chargeback invoices to both plaintiff and Blue Ridge Fabrics in Statesville, North Carolina; and 9) "[m]any of defendant's orders were mailed directly by defendant to Blue Ridge Fabrics in North Carolina, rather than through a sales agent in California."

Sharon Burchette, the president of Blue Ridge Fabrics, submitted an affidavit in which she stated that: 1) in 1985, Blue Ridge Fabrics and plaintiff became closely associated; 2) she accompanied Jerry Carr to California "for the purpose of discussing a business arrangement pursuant to which Blue Ridge would act as sales agent for Taurus, which would manufacture textiles to defendant's specifications"; 3) an agreement was entered into and carried out with "Blue Ridge receiving the orders from defendant, plaintiff manufacturing the textiles, and Specialty Dyeing & Finishing, a North Carolina corporation with a principal place of

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business in South Carolina, finishing the fabric for shipment to defendant"; and 4) plaintiff invoiced defendant for the goods, and defendant's chargeback invoices were addressed to both Blue Ridge Fabrics and plaintiff.

In answering plaintiff's Requests for Admissions, defendant admitted making telephone calls to Blue Ridge Fabrics and plaintiff in North Carolina but stated that the calls related to late deliveries or defective goods and not to purchases or other business. Defendant admitted mailing chargeback invoices to plaintiff and Blue Ridge Fabrics in North Carolina but stated that they were copies of originals given to "factors" for Blue Ridge Fabrics for deductions made by defendant outside of North Carolina. Defendant also admitted corresponding with Sharon Burchette, plaintiff's comptroller and an attorney for plaintiff but indicated that such correspondence was initiated by plaintiff and Blue Ridge Fabrics. Defendant denied purchasing textiles from other North Carolina companies.

From the order of the trial court dismissing the action, plaintiff appeals.

Tucker, Hicks, Hodge and Cranford, by John E. Hodge, Jr.; and Mattox, Mallory & Simon, by Pamela H. Simon, for plaintiff appellant.

Petree, Stockton & Robinson, by G. Gray Wilson and Richard G. Gwizdz, for defendant appellee.

ARNOLD, Judge.

The question whether the trial court has personal jurisdiction over defendant involves a twofold determination. First, do the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against defendant? If so, does the exercise of this power by the North Carolina courts violate due process of law? *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

[1] With respect to the first prong of the determination, plaintiff argues that the trial court has jurisdiction over defendant under N.C.G.S. § 1-75.4, the North Carolina long-arm statute. N.C.G.S. § 1-75.4 sets out the grounds for personal jurisdiction and states that a court has jurisdiction under the following circumstances:

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(5) Local Services, Goods or Contracts.—In any action which:

* * * *

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant.

It appears that defendant is subject to personal jurisdiction under N.C.G.S. § 1-75.4(5)(b). Plaintiff performed services for defendant within this State by manufacturing certain textiles. The record indicates that defendant was well aware that the textiles ordered from Blue Ridge Fabrics were to be manufactured by plaintiff in North Carolina.

[2] However, even if defendant falls within the reach of the long-arm statute, the exercise of jurisdiction over defendant must comport with due process requirements. See *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 348 S.E. 2d 782 (1986). Due process requires certain minimum contacts between the nonresident defendant and the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In each case, there must be some act by which the defendant purposely avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a nonresident defendant will not suffice. *Hanson v. Denckla*, 357 U.S. 235 (1958); *Tom Togs, Inc.*, 318 N.C. at 361, 348 S.E. 2d at 782.

The existence of minimum contacts is a question of fact. *Parris v. Garner Commercial Disposal, Inc.*, 40 N.C. App. 282, 253 S.E. 2d 29, cert. denied, 297 N.C. 455, 256 S.E. 2d 808 (1979). The factors to be considered in determining whether minimum contacts exist are (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties. *Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300, cert. denied, 313 N.C. 604, 330 S.E. 2d 612 (1985).

In the case *sub judice*, Blue Ridge Fabrics, acting as plaintiff's sales representative, contracted with defendant in

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California for the sale of textiles. The contracts in the record are between defendant and Blue Ridge Fabrics and indicate that the goods were to be shipped from South Carolina. Plaintiff manufactured the textiles in North Carolina and shipped them to South Carolina for finishing. The textiles were then shipped from South Carolina to defendant in California.

In its answers to interrogatories, plaintiff lists the following in support of its proposition that defendant had sufficient minimum contacts to allow North Carolina to exercise personal jurisdiction over defendant:

- a. Contracts between Defendant and Blue Ridge Fabrics, Inc. ("Blue Ridge"), in which Defendant expressly, by signing the contract or by failing to object to its terms within 10 days, submitted to jurisdiction in North Carolina.
- b. Invoices from Blue Ridge to Defendant, pursuant to which Defendant, by failing to object within 10 days, submitted to jurisdiction in North Carolina.
- c. Defendant's Purchase Orders.
- d. Defendant's Chargeback Invoices.
- e. Letters from Defendant to Plaintiff and/or Plaintiff's agents.
- f. Plaintiff's Invoices to Defendant.
- g. Telephone calls from Defendant to Plaintiff and/or Plaintiff's agents, and vice versa.

Plaintiff asserts that defendant submitted to jurisdiction by entering into contracts with Blue Ridge Fabrics and failing to object to the terms of invoices from Blue Ridge Fabrics. The contracts and the invoice contained in the record include the following terms:

9. This instrument shall be construed, enforced and performed under North Carolina law.
10. Any dispute or claim arising out of this contract shall be settled by arbitration as provided under N.C. law. This agreement is subject to the Uniform Arbitration Act of North Carolina, and the parties to this agreement agree

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to the settlement by arbitration of any controversy hereafter arising between them relating to this agreement or the failure or refusal to perform the whole or any part hereof or hereafter. The parties consent that all arbitration proceedings shall be held and venue, shall be proper in Buncombe County, North Carolina. The parties agree that they shall be amendable to personal jurisdiction in Buncombe County, North Carolina. . . .

Defendant did not expressly submit to personal jurisdiction under the contracts or the invoices. The arbitration term provides that defendant is subject to personal jurisdiction in Buncombe County, North Carolina for the purpose of arbitration. Plaintiff, however, brought suit in Iredell County and chose to file a lawsuit rather than arbitrate the dispute. The arbitration term in the contracts and invoices do not provide a sufficient basis for asserting personal jurisdiction over defendant since plaintiff filed suit rather than pursuing arbitration. See *Babitt v. Frum*, 606 F. Supp. 680 (S.D.N.Y. 1985).

Plaintiff also asserts that defendant's purchase orders are grounds for asserting jurisdiction over defendant. There are no copies of any purchase orders in the record. John Fulmer's affidavit indicates that defendant never purchased goods in North Carolina. The only evidence in the record of any purchase orders is a list of numbers and dates provided by plaintiff. Likewise, defendant's chargeback invoices do not provide a basis for personal jurisdiction over defendant, especially since there is evidence that the chargeback invoices were copies given to "factors" for Blue Ridge Fabrics for deductions made outside of North Carolina. Finally, the letters and telephone calls concerning the dispute between the parties are not grounds for jurisdiction. See *Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E. 2d 859, cert. denied, 300 N.C. 373, 267 S.E. 2d 677 (1980).

Defendant had insufficient minimum contacts with North Carolina to satisfy the requirements of due process. Accordingly, the order of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

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STATE OF NORTH CAROLINA v. BOBBIE LEE BRADLEY**No. 886SC168**

(Filed 18 October 1988)

1. Homicide § 21.8— second degree murder—evidence sufficient

The evidence was sufficient to support a conviction for second degree murder where defendant began to curse at the victim as she got out of her automobile and walked towards a convenience store; defendant loudly told the victim that he was going to kill her; an argument then ensued and defendant struck the victim in the face, knocking her to her knees; defendant then grabbed the victim by her hair and dragged her as she screamed to her automobile and threw her inside; the victim attempted to escape as defendant entered the automobile but defendant grabbed her again by the hair and prevented her from exiting the automobile; defendant started the car and sped out of the parking lot through a stop sign with the victim's feet hanging out of the automobile; the owner of the convenience store could hear the victim screaming even though he could no longer see the vehicle; the victim's four-year-old son was still in the vehicle; a highway patrolman arriving at the scene of an accident shortly thereafter found defendant kneeling over the victim's body on the shoulder of the road; the victim was dead with multiple cuts and bruises about her head, face, arms and legs; defendant told the officer that the victim had been driving and the officer noticed that defendant had an odor of alcohol about him; debris from the wreck and gouge marks in the pavement caused by the impact were located in the middle of the lane in which the other car had been traveling; the victim's son testified that defendant and the victim were fighting while driving down the road but apparently stopped just prior to the accident; defendant told the trooper at the hospital that the victim had been driving; and a sample of defendant's blood taken approximately three hours after the accident was determined to have a blood alcohol concentration of .108%.

2. Criminal Law §§ 146.1, 138.28— aggravating factor—prior convictions—improper reliance on prosecutor's assertion—not raised at trial—right to appeal waived

A defendant convicted of second degree murder waived his right to appeal any possible error in the district attorney's unsupported statements at sentencing regarding prior convictions by not objecting to them. Insofar as N.C.G.S. § 15A-1446(d)(5) allows a party to raise arguments regarding the sufficiency of the evidence to support a finding of fact at sentencing, it is inconsistent with the spirit and purpose of Rule 10(b)(2) of the Rules of Appellate Procedure and therefore ineffective.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 22 September 1987 in Superior Court, HERTFORD County. Heard in the Court of Appeals 7 September 1988.

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Defendant was charged by a proper bill of indictment with second degree murder in violation of N.C.G.S. § 14-17. Evidence presented at trial tended to show the following facts.

On 20 November 1986 at approximately 9:30 p.m., the defendant entered the Family Mart, a convenient store just north of Murfreesboro. Defendant had a conversation with someone and he began cursing. Defendant then bought a pack of cigarettes and told Louis Gore, the owner of the store, that he would wait outside the store for his father to come and pick him up.

Soon after defendant exited the Family Mart Ms. Joyce Jones, her son, Cadaris Jones, and a friend, Hattie Mae Lassiter, drove up to the store. As Ms. Jones and her friend got out of the automobile and started toward the store, defendant came from around the corner of the building and began to curse at Ms. Jones.

Mr. Gore testified that defendant loudly told Ms. Jones, "I'm going to kill you, kill you bitch before we get to Winton." An argument then ensued, and defendant ultimately struck Ms. Jones in the face, knocking her to her knees. Defendant then grabbed her by her hair and dragged her, as she screamed, approximately ten feet to her automobile and threw her inside. As defendant entered the automobile on the driver's side Ms. Jones attempted to escape, but defendant grabbed her again by the hair and prevented her from exiting the automobile. The defendant started the car and sped out of the parking lot and through a stop sign, with Ms. Jones's feet hanging out of the automobile. Mr. Gore testified that he could hear Ms. Jones screaming even after he could no longer see the vehicle. Cadaris, Ms. Jones's four-year-old son, was still in the vehicle.

Between 9:45 and 9:50 p.m. Trooper D. W. Banks of the North Carolina Highway Patrol arrived at the scene of an accident on highway 158, between Murfreesboro and Winton, and found the automobile in which defendant drove from the Family Mart, along with a second vehicle. He observed the body of Ms. Jones lying face down on the shoulder with defendant kneeling over her, crying. Banks examined Ms. Jones and determined that she was dead, noting that she had multiple cuts and bruises about her head, face, arms and legs. When asked what happened defendant

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told the officer that Ms. Jones had been driving. Trooper Banks noticed that defendant had an odor of alcohol about him.

Two men were pinned in the second automobile. The driver, David Jordan, testified that he had been traveling on highway 158 from Winton to Murfreesboro at a speed below the limit due to the fact that it was raining. He stated that he "was just riding along and the next thing I know I came to, came to and they said that I had been in an accident and then I blacked out again."

Debris from the wreck, as well as gouge marks in the pavement caused by the impact, were located in the middle of the lane in which Mr. Jordan had been traveling. Cadaris, Ms. Jones's son, testified that defendant and Ms. Jones were fighting while driving down the road, but apparently stopped just prior to the accident.

Trooper Banks followed defendant to the hospital and interviewed him. Defendant again said that Ms. Jones had been driving. A sample of defendant's blood was taken approximately three hours after the accident. The blood was subsequently analyzed by the S.B.I. forensic chemical lab and determined to have a blood alcohol concentration of .108%.

Defendant was tried by a jury in the Superior Court of Hertford County and found guilty of second degree murder. He was sentenced to twenty years, exceeding the presumptive sentence of fifteen years.

Attorney General Lacy H. Thornburg, by Associate Attorney General Linda Anne Morris, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Staples Hughes, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the evidence at trial was insufficient as a matter of law to support a conviction of any of the offenses submitted to the jury. Those offenses were: second degree murder, involuntary manslaughter, felony death by vehicle and misdemeanor death by vehicle.

Murder in the second degree is the lawful killing of a human being with malice but without premeditation and deliberation.

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State v. Robbins, 309 N.C. 771, 775, 309 S.E. 2d 188, 190 (1983). While an intent to kill is not a necessary element of murder in the second degree, that crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death. *State v. Lang*, 309 N.C. 512, 525, 308 S.E. 2d 317, 323 (1983); *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978).

The Supreme Court has stated that there are three kinds of malice in the North Carolina law of homicide:

One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express, or particular malice.

. . . Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

. . . Both these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

State v. Reynolds, 307 N.C. 184, 191, 297 S.E. 2d 532, 536 (1982) (citations omitted). It is the second kind of malice that was evidenced by defendant in the case at bar and also comports with the definition given in *State v. Wilkerson*, which is,

any act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person" is sufficient to supply the malice necessary for second degree murder. Such an act will always be accompanied by a general intent to do the act itself but it need not be accompanied by a specific intent to accomplish any particular purpose or do any particular thing.

Wilkerson, 295 N.C. 559, 581, 247 S.E. 2d 905, 917 (1978).

The actions by the defendant were similar to the actions of defendant in *State v. Snyder*, 311 N.C. 391, 317 S.E. 2d 394, *disc.*

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rev. denied, 312 N.C. 89, 321 S.E. 2d 906 (1984). There, the defendant, already intoxicated, drove to a local tavern where the owner of the bar refused to serve him more alcohol. After getting into an affray with the owner, defendant drove away at a high rate of speed, passing one motorist in a "no-passing" zone, hitting a motorcycle from behind and forcing it off the road, and finally running through a stop light and into an automobile killing all three passengers. *Id.* at 392-393, 317 S.E. 2d at 394-395. The Supreme Court upheld the defendant's conviction of second degree murder. *Id.*

The evidence in the case at bar is sufficient to support a conviction of second degree murder. We find no error in the judgment of the trial court and need not discuss the other three issues presented to the jury.

[2] The defendant's second contention is that the trial court committed error in admitting evidence of his prior convictions as aggravating factors at the sentencing hearing. He argues that the district attorney merely stated defendant's record without giving proof.

At the sentencing hearing, the district attorney recited a litany of past offenses by the defendant although he did not use original court records or certified copies as required by N.C.G.S. § 15A-1340.4(e). The Supreme Court in *State v. Swim* stated that "[U]nder the Fair Sentencing Act, a trial court may not find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists." *Swim*, 316 N.C. 24, 32, 340 S.E. 2d 65, 70-71 (1986). This same sentiment was expressed by a panel of this Court in *State v. Mack* where it said that a prosecutor's unsupported remarks, standing alone, were insufficient to prove a defendant's prior convictions by a preponderance of the evidence. *Mack*, 87 N.C. App. 24, 34-35, 359 S.E. 2d 485, 492 (1987), *disc. rev. denied*, 321 N.C. 477, 364 S.E. 2d 663 (1988).

Defendant did not object to the statements made by the district attorney. Neither he nor his attorney challenged their accuracy. Generally, the failure to object to the method of admission of a defendant's record operates as a waiver of a defendant's right to assert the method of proof of a record as a basis for appeal. *State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1982). In

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Mack, however, the Court sought to distinguish *Massey* by finding that N.C.G.S. § 15A-1446(d) waives the requirement for an objection. The statute provides that:

Errors based upon the following grounds . . . may be subject to appellate review even though no objection . . . has been made in the trial division.

* * * *

(5) The evidence was insufficient as a matter of law.

This reasoning may be doubtful because N.C.G.S. § 15A-1446 (d)(5) was not intended to be used in a sentencing context, but rather was designed to allow a defendant to question the sufficiency of the evidence to support a verdict against him without objecting or excepting at trial to the trial court's denial of his motion to dismiss. There is no authority to support the Court's extension of the statute to the sentencing context. We do note, however, that our Supreme Court has found that when N.C.G.S. § 15A-1446(d)(5) attempts to allow for the appeal on the sufficiency of the evidence, absent a motion or objection at trial, it is inconsistent with the provisions of Appellate Rule 10(b)(3), and as such that provision must fail. See *State v. Stocks*, 319 N.C. 437, 355 S.E. 2d 492 (1987). There is no authority to revive the statute for sentencing purposes.

Nevertheless, assuming *arguendo* that N.C.G.S. § 15A-1446 (d)(5) is applicable to sentencing issues, defendant has failed to properly preserve his exceptions for review. Pursuant to Appellate Rule 10(b)(2) in order to preserve a right to appeal a party must object to the jury charge, or any omission therefrom, before the jury retires. The rule also explicitly requires a party to object to the failure of the trial court to make necessary findings and conclusions in order to advance these issues on appeal.

The purpose of this rule appears to be to provide the trial court an opportunity to correct any obvious defects and thereby eliminate the need for an appeal and a new proceeding. Implicit in this rule is also an obligation on a party to object to erroneous findings made by the trial court. This requirement is consistent with the spirit of the rule which can be ascertained from the requirements for objection with regard to errors in the jury charge. Therefore, insofar as the provisions of N.C.G.S. § 15A-1446(d)(5)

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allows a party to raise arguments regarding the sufficiency of the evidence to support a finding of fact at sentencing, it is inconsistent with the spirit and purpose of Rule 10(b)(2). Statutes which are in conflict with the Rules of Appellate Procedure are ineffective. See *State v. Elam*, 302 N.C. 157, 273 S.E. 2d 661 (1981). Therefore, N.C.G.S. § 15A-1446(d)(5) is ineffective to override the purpose of Rule 10(b)(2) and the case law set forth in *Massey*. Thus, defendant waived his right to appeal any possible error regarding the district attorney's statements at sentencing by failing to object to them.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

CLARA S. CUMMINGS, TRUSTEE UNDER THE WILL OF PEGGY FOX SNYDER V.
CHARLES WILLIAM SNYDER, AND LISA KIRBY, GUARDIAN AD LITEM FOR
BRADLEY SNYDER

No. 8810SC269

(Filed 18 October 1988)

Wills § 28.4; Trusts § 5 – marital home held in trust for benefit of husband – termination clause – construction

In an action to terminate a life estate in respondent which had been created by his deceased wife's will and held in trust for his benefit during his lifetime, the only logical interpretation of the language "in the event my said husband shall fail to reside in my said residence for at least six consecutive months during any five-year period during the term of this trust, then it shall be deemed that he thereby released his lifetime right to reside in the residence and my trustee shall then have the power to lease or sell my said residence . . ." is that respondent need only reside in the home for a single six consecutive month period during any five-year period. The trial court's order terminating the life estate was remanded for entry of judgment in favor of respondent.

Judge WELLS dissenting.

APPEAL by petitioner from *Bowen, Judge*. Order entered 8 October 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 26 September 1988.

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Petitioner instituted this action to terminate respondent's life estate in the former marital home created by the will of respondent's deceased wife and held in trust. The evidence presented at trial tended to show the following facts.

The deceased, Peggy Ann Fox-Snyder, left a will that created two trusts. The first trust contains the marital home and is to be held for the benefit of her husband (respondent) during his lifetime. The second trust contains the deceased's life insurance proceeds for the benefit of her minor child and secondarily for the respondent.

The language of the first trust, Trust A, is as follows:

III.

To my Trustee, named hereinafter, I give, devise and bequeath the following property, IN TRUST, for the uses and purposes recited hereinafter:

(a) TRUST SHARE "A":

I give, devise and bequeath to my Trustee the residence which I own located at 2215 Anderson Drive, Raleigh, Wake County, North Carolina to be held in Trust Share "A" for the following uses and purposes:

(i) To my husband, CHARLES WILLIAM SNYDER, I grant the right to use my said residence as his residence during his lifetime. For any period of time that my said husband shall reside in my said residence, he shall be responsible for and pay for any utility bills and maintenance with respect thereto. If my said husband shall at any time elect not to reside in my said residence, my Trustee shall have the right to lease my said residence for residential purposes for a period of twelve (12) months or less and my said husband shall not have the right to again reside therein until after the expiration of said lease period. If my said husband does not elect to again reside in my said residence by giving written notice thereof at least sixty (60) days prior to the termination of said lease period, then he shall be required to wait an additional lease period of up to twelve (12) months before electing to return to the residence. In the event my said husband shall fail to reside in my said residence for at least six (6) con-

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secutive months during any five (5) year period during the term of this Trust, then it shall be deemed that he thereby released his lifetime right to reside in the residence and my Trustee shall then have the power to lease or sell my said residence if in her discretion, she finds it to be in the best interest of my said child.

Petitioner, Trustee for both trusts, brought a petition before the Clerk of Superior Court, Wake County, to have the life estate in respondent terminated. She claimed that respondent had not lived in the Anderson Drive residence for six consecutive months and thus he released his life estate in the trust. Respondent contended that he had occupied the residence for a three-day period during that time.

The Clerk of Superior Court, pursuant to N.C.G.S. § 1-273, ordered the action to be transferred to the Superior Court because there were disputed issues of fact. Judge Bowen heard the case on 18 September 1987 and ordered that the life estate be terminated, finding that respondent had not lived in the residence for the three days he claimed. Respondent then moved for a new trial pursuant to Rule 59(a)(9) of the North Carolina Rules of Civil Procedure claiming that the court had incorrectly construed the will.

Judge Bowen granted respondent's motion for new trial pursuant to Rules 59(a)(9) and 59(a)(8) stating that in all likelihood error was committed in interpreting the will. From that order petitioner appeals.

Calhoun & Nichols, by M. Jackson Nichols; and Gulley, Eakes & Volland, by Daniel F. Read, for petitioner appellant.

Young, Moore, Henderson & Alvis, by John A. Michaels, for respondent appellee.

Faison, Brown, Fletcher & Brough, by Mark Kirby, Guardian ad Litem for Lisa Kirby.

ARNOLD, Judge.

The perplexity presented by the interlocutory nature of this appeal could have been avoided if the trial court had reopened the judgment, amended its conclusions, and directed entry of a

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new judgment in favor of the respondent. See N.C.G.S. § 1A-59 (9)(a).

When a verdict is set aside for error in law, and not as a matter of discretion, the aggrieved party may appeal, provided the error is specifically designated. *Britt v. Allen*, 291 N.C. 630, 635, 231 S.E. 2d 607, 611 (1977). Because there was an error in law in the trial court's first order, we hold that the order awarding a new trial is appealable.

The interpretation of a will's language is a matter of law. *Lee v. Barksdale*, 83 N.C. App. 368, 375, 350 S.E. 2d 508, 513 (1986), *disc. rev. denied*, 319 N.C. 404, 354 S.E. 2d 714 (1987); *Trust Co. v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246 (1956). When the parties place nothing before the court to prove the intention of the testator, other than the will itself, they are simply disputing the interpretation of the language which is a question of law. *Leonard v. Dillard*, 87 N.C. App. 79, 81, 359 S.E. 2d 497, 498 (1987). In the case *sub judice* the parties offer nothing other than the will itself as evidence for their contentions.

There are several basic rules of will interpretation. The most basic rule is that the intent of the testator is the polar star that must guide the courts in the interpretation of a will. *Adcock v. Perry*, 305 N.C. 625, 629, 290 S.E. 2d 608, 611 (1982). A second cardinal principle is to give effect to the general intent of the testator as that intent appears from the consideration of the entire instrument. *Id.* The testator's meaning must be collected from the will itself by attending to the different parts of it and comparing and considering them together. *Morris v. Morris*, 246 N.C. 314, 316, 98 S.E. 2d 298, 300 (1957).

Petitioner contends that the primary intent of the testatrix was to provide for her minor child. With that contention we agree; however, we do not agree that terminating the life estate furthers that intent nor is it warranted in the language of the trust.

The only logical interpretation of the language of Trust A is that respondent need only reside in the home for a single six consecutive month period during any five year period. We can see no other way to construe this language.

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When looking at all of the language of Trust A, it is clear that testatrix provided for the home's upkeep in the event respondent did not reside in it more than the required time. The trustee is empowered to lease the home for no more than twelve months, but such lease can be extended for another twelve months if respondent chooses not to move in after the first term ends. The ability to lease the residence provides a means to maintain the house while providing respondent an opportunity to live there. The respondent is afforded an opportunity to live in the marital home, but he is not mandated to do so.

We vacate the 18 September 1987 order of the trial court which terminated the life estate and remand for entry of judgment in favor of respondent.

Vacated and remanded.

Chief Judge HEDRICK concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

In my opinion, the intent expressed in the disputed portion of Mrs. Snyder's will was that the residence on Anderson Drive be kept in use, either as a residence for Mr. Snyder, or to be leased or sold if he chose not to reside there. One signal of his choice not to live there was lack of occupancy on his part for any six consecutive months during any five year period. In his order of 18 September 1987, Judge Bowen found that Mr. Snyder had not lived in the residence under the terms of the will and had forfeited his life estate. This was the correct construction of the will.

I vote to reverse the order granting a new trial and to affirm the order of 18 September 1987.

McAdoo v. City of Greensboro

JESSIE V. McADOO; JOSEPH G. A. DUNGEY AND WIFE, MRS. JOSEPH G. A. DUNGEY; CHESTER FEWELL AND WIFE, MRS. CHESTER FEWELL; CLAYTON WILEY; ALVONE A. COUNTS AND WIFE, CAROLYN H. COUNTS; NATHANIEL MARSHBURN AND WIFE, PEARL H. MARSHBURN; PLAINTIFFS v. CITY OF GREENSBORO, DEFENDANT, AND JAMES L. MOORE AND WIFE, JEANNETTE J. MOORE, PLAINTIFFS v. CITY OF GREENSBORO, DEFENDANT

No. 8818SC308

(Filed 18 October 1988)

1. Eminent Domain § 13— road widening—completed in sections—statute of limitations

The trial court erred in an inverse condemnation action by granting summary judgment for defendants based on the statute of limitations where the road on which plaintiffs reside was widened in sections; the work was completed on the section on which plaintiffs resided on 10 May 1984; final inspection and acceptance by defendant was on 31 May 1984; the contractor was required to maintain the road for three months after defendant's acceptance; final payment was authorized on 5 September 1984 and made on 7 September 1984; these actions were filed on 7 August 1986 and 27 August 1986; and the widening of the entire road had not yet been completed at the time these actions were filed. The statute of limitations for inverse condemnation, N.C.G.S. § 40A-51(a), is 24 months from the taking or the completion of the project; the individual sections here meet the definition of projects in the statute of limitations; and defendant's authorization of final payment on 7 September 1984 shows that defendant did not consider the project complete until the maintenance period was over.

2. Eminent Domain § 13—widening of road—inverse condemnation as exclusive remedy

The trial court did not err by granting summary judgment for defendant city on plaintiffs' trespass claims in an action arising from the widening of a road because the city's power of eminent domain insulates it from trespass actions regardless of whether compensation was paid or proper procedures used. The exclusive remedy for a taking is inverse condemnation under N.C.G.S. § 40A-51.

APPEAL by plaintiffs from *Collier, Judge*. Judgment entered 9 November 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 September 1988.

This is an action wherein plaintiffs seek damages for inverse condemnation and trespass due to defendant's widening of the road on which plaintiffs' property is located. Prior to 1 July 1974, the Greensboro City Council proposed widening Pisgah Church Road from Lawndale Drive to Church Street. Notice was pub-

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lished in local newspapers and sent to residents along Pisgah Church Road. On 1 July 1974, the widening was approved, and the resolution ordering improvements was published.

Defendant contracted for the widening of a section of Pisgah Church Road on 17 June 1982. This section, between Normandy Road and Stone Court, is the section on which plaintiffs reside. The contractor began work on the section on 29 July 1982. The widening was completed on 10 May 1984, and final inspection and acceptance by defendant was on 31 May 1984. The contractor was required to maintain the road for three months after defendant's acceptance. During this time, the contractor was obligated to do seeding, driveway repairs or maintenance. On 5 September 1984, defendant authorized final payment to the contractor, and final payment was made on 7 September 1984.

The action entitled *McAdoo v. City of Greensboro* was instituted on 7 August 1986, and *Moore v. City of Greensboro* was instituted on 27 August 1986. As to the inverse condemnation action, defendant admitted plaintiffs owned the property (subject to alleged adverse interests), that it made improvements to the road and that it filed no complaint containing a Declaration of Taking. Defendant denied any taking and raised an affirmative defense of the two-year statute of limitations under G.S. 40A-51(a). As to the trespass action, defendant made similar admissions. Defendant denied any trespass and raised the three-year statute of limitations of G.S. 1-52(3).

Defendant moved for summary judgment on both claims on the ground that they were barred by the statutes of limitations. By stipulation of the parties, the limitations issues were the only issues considered by the court. Summary judgment was then entered for defendant based on the statutes of limitations. Plaintiffs appealed.

Alexander Ralston, Pell & Speckhard, by Donald K. Speckhard and Stanley E. Speckhard, for plaintiffs, appellants.

A. Terry Wood for defendant, appellee.

HEDRICK, Chief Judge.

[1] Plaintiffs first contend the trial court erred by granting summary judgment to defendant because the inverse condemnation

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claim is not barred by the statute of limitations. Statutes of limitations are inflexible and unyielding. *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 301 S.E. 2d 459, *disc. rev. denied*, 309 N.C. 319, 306 S.E. 2d 791 (1983). The statute of limitations for inverse condemnation actions is defined in G.S. 40A-51(a), which in pertinent part states:

The action may be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later.

The plaintiffs have the burden of showing their actions were filed within the statutory period. *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 304 S.E. 2d 164 (1983). Since plaintiffs here admit they cannot prove when the actual taking occurred, they must show their action was instituted within 24 months of "the completion of the project involving the taking."

Plaintiffs contend the "project" encompasses the entire proposal by defendant to widen Pisgah Church Road. The widening, done in sections, was not yet complete at the time the action was instituted. For this reason, plaintiffs argue the limitations period had not yet begun to run. We disagree with plaintiffs' definition of "project."

Although defendant designated the entire widening as a "project," there is evidence that individual sections were also referred to as "projects." Because the road was widened in sections by different contractors, there were beginning and ending points to the widening of each section. These individual sections meet the definition of "projects" for purposes of G.S. 40A-51(a). Our courts have recognized there may be excusable delay in filing actions. See *Midgett v. Highway Commission*, 260 N.C. 241, 132 S.E. 2d 599 (1963). The legislature, in enacting G.S. 40A-51(a), sought to account for such delay and provide plaintiffs adequate opportunity to discover damage. *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E. 2d 844 (1986). It would be unreasonable, however, for plaintiffs to be able to institute an action years after their property was affected simply because the label of "project" was attached to something which was completed in sections over a period of many years. Each section constituted an individual "project." See *Railroad v. Olive*, 142 N.C. 257, 55 S.E. 2d 263 (1906). Under the facts of this case, plaintiffs had 24 months from

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the completion of the individual section which for purposes of G.S. 40A-51(a) was the "project involving the taking."

Plaintiffs further argue, however, that the individual section, and therefore the project, was not completed until 31 August 1984 when the maintenance period was completed. The institution of plaintiffs' actions would then be within the statute of limitations period. We agree.

The statutory period runs from the completion of the "project." This does not necessarily mean it runs from the completion of construction. The fact that defendant accepted the improvements is not relevant as it did so on condition that the project be completed with necessary maintenance. Defendant's authorization of final payment on 5 September 1984 and subsequent payment on 7 September 1984 show that defendant did not consider the project completed until the maintenance period was over. For these reasons, we hold completion of the project was not until 31 August 1984, and the trial court erred in granting summary judgment to defendant based on the statute of limitations. This action is therefore remanded to the Superior Court for further proceedings on the claim of inverse condemnation.

[2] Plaintiffs further contend the trial court erred in granting defendant's motion for summary judgment because their trespass action is not barred by the statute of limitations. We disagree. Summary judgment for defendant was appropriate not because of the statute of limitations but because defendant as a city had the power of eminent domain, and such power insulates it from trespass actions regardless of whether compensation was paid or proper procedures were used. The exclusive remedy for failure to compensate for a "taking" is inverse condemnation under G.S. 40A-51. See *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982); *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E. 2d 844 (1986). The fact that G.S. 40A-51(c) provides that "[n]othing in this action shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property" is not relevant. An owner has no common-law right to bring a trespass action against a city. Plaintiffs' argument has no merit.

Reversed and remanded in part; affirmed in part.

Judges ARNOLD and COZORT concur.

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STATE OF NORTH CAROLINA v. DARRYL EUGENE HUNT

No. 8821SC381

(Filed 18 October 1988)

Homicide §§ 26, 2.1— second degree murder—instruction on acting in concert—error

The trial court erred in a prosecution for a second degree murder which arose from a robbery by giving the jury an instruction which could have allowed a conviction for second degree murder based on the *mens rea* for robbery. *Mens rea* must be shown as to each defendant for crimes requiring a specific *mens rea*, even where defendant is charged on a theory of aiding and abetting or acting in concert; furthermore, North Carolina does not recognize second degree felony murder. Even though the final mandate in this case was correct, it cannot be certain that the correct statement of the law remedied the confusion caused by the faulty instruction.

APPEAL by defendant from *Helms, Judge*. Judgment entered 2 October 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 September 1988.

On 19 May 1986, defendant was indicted for the 17 September 1983 murder of Arthur Wilson. Sammie Mitchell and Merritt Drayton were also indicted at that time for Wilson's murder. Drayton pled guilty to second degree murder and judgment was entered accordingly. Mitchell pled not guilty to his indictment, and was tried and found guilty of second degree murder.

Defendant entered a plea of not guilty. At trial the State proceeded on a second degree murder charge. Defendant was found guilty of second degree murder and sentenced to serve forty years in prison.

At trial there was testimony that Wilson's body was found at the 1700 block of Claremont Avenue at 2:30 a.m. 17 September 1983. The victim had a head wound which was determined by a pathologist to be the cause of death. Wilson's body was found not far from a drinkhouse which Wilson, Drayton, Mitchell and the defendant had been at earlier in the evening. Wilson had been buying drinks for others at the drinkhouse. When Mitchell asked Wilson to buy him a drink, Wilson refused. A witness testified that Mitchell then spoke to Hunt and Drayton saying "That's all right. We'll fix him. I'll get his money."

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Three witnesses for the State testified concerning the attack on Wilson. All three witnesses had been at the drinkhouse drinking before the attack on Wilson. The first witness stated that she saw the victim, Mitchell, Drayton and defendant at the drinkhouse. She testified that Mitchell carried a stick which she identified as the murder weapon and that the defendant carried a knife. She testified that she saw Wilson leave the drinkhouse by the front door at about the same time that Mitchell, Drayton and defendant left by the back door. She left the drinkhouse in the same direction as that taken by Wilson. She saw Mitchell hit Wilson over the head with a stick and Hunt kick him. A second witness also testified that she saw Mitchell hit Wilson and Hunt kick him.

The third witness, Davis, stated that she left the drinkhouse with Drayton. They walked up Claremont until they came upon Wilson with Mitchell and defendant. Davis stated that she saw Mitchell knock Wilson down and kick him a couple of times. She did not see the defendant kick Wilson. Davis then asked Drayton to leave with her but he refused. She left Mitchell, Drayton and defendant standing over Wilson. She did not see a stick at the time. None of the three witnesses saw any of the other two witnesses on the street that night.

In its instructions to the jury the court stated that it could convict defendant of second degree murder if it found that defendant acted in concert with Sammie Mitchell "with a common purpose to commit robbery." Defendant's objection to this instruction was overruled.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.

Ferguson, Stein, Watt, Wallas & Adkins, by Adam Stein and James E. Ferguson, II, for defendant appellant.

ARNOLD, Judge.

As his first assignment of error defendant contends that the trial court erroneously instructed the jury that it could convict defendant of second degree murder if it found that he acted in concert with Mitchell "with a common purpose to commit robbery." We agree.

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Defendant contends that this portion of the instructions constitute error:

Now for a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit robbery, each of them is held responsible for the acts of the others done in the commission of the robbery.

Defendant correctly argues that a correct acting in concert instruction for second degree murder would read:

For a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit *second degree murder*, each of them is held responsible for the acts of the others done in the commission of the *second degree murder*.

Pattern Jury Instructions, N.C.P.I.-Crim. 202.10 (emphasis added).

A conviction for second degree murder requires a finding that the defendant acted intentionally and with malice to kill the victim. *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E. 2d 905, 917 (1978). In *Wilkerson* the Court stated that second degree murder "does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death." *Id.* We agree with defendant that the erroneous instruction given by the trial court could have allowed the defendant to be convicted of second degree murder based on the defendant's *mens rea* for robbery. See *State v. Reese*, 319 N.C. 110, 141-143, 353 S.E. 2d 352, 370-372 (1987). *Reese* unequivocally states that even where a defendant is charged on a theory of aiding and abetting or acting in concert "for crimes requiring a specific *mens rea*, that *mens rea* must be shown as to each defendant." *Id.* at 141 n.8, 353 S.E. 2d at 370.

Further, defendant correctly points out that North Carolina does not recognize an offense of second degree felony murder. *State v. Davis*, 305 N.C. 400, 422, 290 S.E. 2d 574, 588 (1982). The instruction fails because it may have led the jury to convict the defendant of second degree murder if they believed he intentionally participated in the robbery. Had the jury followed the rationale set out in the incorrect instruction, it could have wrongly

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convicted the defendant based on what amounts to an instruction for second degree felony murder.

The State points out that the erroneous instructions quoted above by defendant were immediately followed by this final mandate:

So, I charge that if you find from the evidence and beyond a reasonable doubt that on or about the alleged date, the defendant, acting either by himself or acting together with Sammy Mitchell, intentionally and with malice killed the victim with a deadly weapon, it would be your duty to return a verdict of guilty of second degree murder.

We cannot be certain that this correct statement of the law necessarily remedied the confusion caused by the faulty instruction. "When a court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part." *State v. Roth*, 89 N.C. App. 511, 514, 366 S.E. 2d 486, 488 (1988), citing *State v. Harris*, 289 N.C. 275, 221 S.E. 2d 343 (1976). The charge was incorrect and defendant is entitled to a new trial.

In light of our holding it is unnecessary to review defendant's additional assignments of error.

New trial.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. DARIS DEXTER ALVERSON

No. 8817SC199

(Filed 18 October 1988)

1. Criminal Law § 99.5— rape—comments to defense counsel—no error

The trial court did not express an opinion in a prosecution for rape where the judge's comments were routinely made in the course of the right and duty the trial judge had to control examination and cross-examination of witnesses and the questions asked were for clarification purposes; moreover, even if any of the comments were improper, defendant has not shown prejudice. N.C.G.S. § 15A-1222.

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2. Constitutional Law § 30— rape—failure to allow review of investigative file—no error

The trial court did not err in a rape prosecution by not allowing defense counsel to review the entire investigative file where the file consisted of internal documents made by law enforcement officers which were not subject to discovery. N.C.G.S. § 15A-904.

3. Rape and Allied Offenses § 4.3— cross-examination concerning the victim's sexual activity with boyfriend—excluded—no error

The trial court did not err in a prosecution for rape by not allowing cross-examination of the victim about sexual activity with her boyfriend where defendant speculated that the victim was motivated to accuse him of rape because she was pregnant by her boyfriend. N.C.G.S. § 8C-1, Rule 412.

4. Criminal Law § 138.14— rape—one aggravating factor—no mitigating factors—35-year sentence not improper

There was no abuse of discretion in the imposition of a 35-year sentence for second degree rape where there were no mitigating factors and the trial judge found as an aggravating factor that defendant had a prior conviction or convictions for offenses punishable by more than 60 days confinement.

APPEAL by defendant from *Wood, Judge*. Judgment entered 29 October 1987 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 13 September 1988.

This is a criminal action wherein defendant was charged in a proper bill of indictment with first degree rape in violation of G.S. 14-27.2. The evidence presented at trial tends to show that the victim knew defendant, had been to his apartment previously, and had used drugs with him. On 3 May 1987, defendant asked the victim to take him somewhere. Defendant had the victim take him to a school where he was supposed to meet someone. While they were waiting, defendant pulled out a knife and forced the victim to have sex with him. She then drove defendant back home and went to a friend's house where she called the police.

The jury found defendant guilty of second degree rape, and he was sentenced to 35 years in prison. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

Daniel K. Bailey for defendant, appellant.

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HEDRICK, Chief Judge.

[1] Defendant first contends the trial court erred by expressing its opinion as to his guilt in front of the jury. He bases this argument on 39 exceptions noted in the record. During the trial, the trial judge on numerous occasions sustained objections by the State that defendant's counsel was leading witnesses on direct examination. He admonished defendant's counsel by making comments such as "I can't let you testify for your own witness," and "[y]ou may ask when it was, that is an easy question, when, where, why and what." Defendant argues the trial judge did not admonish the State's attorney when he led witnesses, and that this expressed an opinion as to defendant's guilt.

The trial judge on other occasions admonished defendant's counsel for "badgering the witness" and "arguing" on cross-examination. Defendant contends that these comments and questioning of witnesses by the trial judge are examples of favoritism and partiality on the part of the trial judge. We disagree.

Under G.S. 15A-1222, the judge "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." It is the right and duty, however, of the trial judge to control examination and cross-examination of witnesses. *State v. Turner*, 66 N.C. App. 203, 311 S.E. 2d 331, *disc. rev. denied*, 311 N.C. 768, 321 S.E. 2d 156 (1984). The trial judge may also ask a witness questions for the purpose of clarifying testimony. *State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383 (1982).

We have reviewed all the exceptions defendant has noted in the record in support of his argument, and find that the trial judge's comments did not express an opinion as to defendant's guilt. All of the comments were routinely made in the course of the right and duty the trial judge had to control examination and cross-examination of witnesses, and the questions asked were for clarification purposes. Even if any of the trial judge's comments or questions were improper, defendant has not shown that he was prejudiced. See *State v. Lofton*, 66 N.C. App. 79, 310 S.E. 2d 633 (1984). This argument has no merit.

[2] Defendant's second argument is that "the trial court erred in not allowing defense counsel to review the entire investigative

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file compiled in this case. . . ." G.S. 15A-904 provides that the Criminal Procedure Act "does not require the production of reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case. . . ." In this case, the investigative file requested by defendant consisted of internal documents made by law enforcement officers, and none of it was subject to discovery by defendant. This argument is without merit.

[3] Defendant's third argument is that the trial court erred by not allowing cross-examination of the prosecuting witness about her sexual activity with her boyfriend. Under G.S. 8C-1, Rule 412, the sexual behavior of the prosecuting witness is irrelevant unless the behavior is as follows:

- (1) Was between the complainant and the defendant; or
- (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
- (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
- (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

In this case, defendant wanted cross-examination of the prosecuting witness because he speculated she was motivated to accuse him of rape because she was pregnant by her boyfriend. This does not fall under an exception to Rule 412, and therefore is not relevant. The trial court was correct when it did not allow cross-examination of the prosecuting witness.

[4] Finally, defendant contends the trial court erred by sentencing defendant based upon improper aggravating factors. The record indicates that the trial judge found as an aggravating factor that defendant had a prior conviction or convictions for offenses

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punishable by more than 60 days confinement. No mitigating factors were found. The trial judge, in his sound discretion, may increase sentences from the presumptive term upon finding aggravating factors. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). A single aggravating factor is sufficient to support a sentence greater than the presumptive. *State v. Upright*, 72 N.C. App. 94, 323 S.E. 2d 479 (1984), *disc. rev. denied*, 313 N.C. 513, 329 S.E. 2d 400 (1985). The weight attached to a particular aggravating factor is within the discretion of the trial judge. *State v. Salters*, 65 N.C. App. 31, 308 S.E. 2d 512 (1983), *disc. rev. denied*, 310 N.C. 479, 312 S.E. 2d 889 (1984). In this case, there has been shown no abuse of discretion, and the trial judge's imposition of a 35-year sentence based on the aggravating factor found was not error.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. KENDALL DALE RUSSELL

No. 8820SC234

(Filed 18 October 1988)

Criminal Law § 86.3— cross-examination concerning prior escape attempt—no error

The trial court did not abuse its discretion in a prosecution for first degree sexual offense by allowing further questioning of defendant regarding a prior escape where defendant's arrest record did not reflect a conviction and the court had instructed the jury to disregard earlier testimony concerning any conviction for escape. The additional inquiry did not challenge defendant's denial of the escape conviction; rather, it had the effect of clarifying defendant's prior response.

APPEAL by defendant from *Davis (James C.), Judge*. Judgment entered 26 August 1987 in Superior Court, STANLY County. Heard in the Court of Appeals 8 September 1988.

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On 23 March 1987 and 1 June 1987, defendant was indicted in separate bills of indictment for first degree sex offense with two children under the age of thirteen. Defendant entered pleas of not guilty. On 26 August 1987 he was convicted on both indictments and sentenced to two consecutive life terms. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William F. Briley, for the State.

Fred Stokes for defendant-appellant.

SMITH, Judge.

Defendant brings forth as his sole assignment of error the trial court's ruling allowing the State to cross-examine defendant, over objection, about defendant's alleged 1986 escape from the North Carolina Department of Correction. Specifically, he contends that the court should not have allowed the State to question defendant about an alleged escape in that defendant had previously denied on cross-examination being convicted of escape. Defendant contends the subsequent questioning about the escape was improper and prejudicial because the State was bound by defendant's denial. We disagree.

During the course of the cross-examination of defendant, the following exchanges took place.

Q. And it was from the prison in Mecklenburg County that you escaped back in 1986?

MR. STOKES: Object to that.

COURT: As to the form of the question as to whether or not he was convicted of it you may ask him that.

Q. Were you convicted of escaping from prison in Mecklenburg County on or about the 23rd of October 1986?

A. No ma'm; I wasn't. They got me for authorized leave.

Q. You were convicted of unauthorized leave?

A. Yes.

After a bench conference out of hearing of the jury, the court determined that the State's question regarding defendant's con-

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viction for escape was improper because defendant's arrest record did not reflect a conviction. The court then instructed the jury to disregard the testimony concerning any conviction for escape. The State continued:

Q. Did you in fact escape from the North Carolina Department of Corrections?

MR. STOKES: Object.

COURT: Overruled. . . . EXCEPTION No. 2

A. You mean at the prison?

COURT: The question is simply whether or not you escaped from the Department of Corrections.

A. Yes I did.

A similar issue was addressed in *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982), in which the defendant, on trial for armed robbery, was cross-examined about other robberies. When the defendant persistently denied involvement in the robberies, the district attorney confronted the defendant with prior inculpatory statements regarding the other robberies. At that time, the defendant volunteered the information contained in the statements. The Supreme Court stated that

'[a] witness's denial of a conviction or of specific degrading conduct does not per se preclude further cross-examination with reference to these matters. . . . [I]t is for the trial judge to say how far the State may go "in sifting" the witness who denies the commission of the acts about which he is cross-examined. The scope of such cross-examination is subject to his discretion.'

Id. at 494-95, 293 S.E. 2d at 763, quoting *State v. Garrison*, 294 N.C. 270, 278-79, 240 S.E. 2d 377, 382 (1978) (citation omitted).

In light of *Beaty*, the trial court in the instant case did not abuse its discretion in allowing further questioning of defendant regarding his escape. The State's additional inquiry did not challenge defendant's denial of an escape conviction; rather, it had the effect of clarifying defendant's prior response.

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Apparently the trial judge allowed the additional cross-examination of defendant under our evidentiary practice as was in effect prior to the enactment of the North Carolina Rules of Evidence. The old practice allowed cross-examination as to prior bad acts or misconduct as long as the examining attorney had a good faith basis for the questions. *See State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986). Under the present rule, G.S. 8C-1, Rule 608(b), specific instances of conduct are admissible only to attack or support a witness's credibility or truthfulness. However, defendant does not contend the evidence was inadmissible under G.S. 8C-1, Rule 608(b) and we do not specifically address this issue. However, we are of the opinion that even if the challenged testimony had been admitted into evidence, over defendant's objection under Rule 608(b), such admission would have constituted harmless error.

For the foregoing reasons, we find

No error.

Judges ORR and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 OCTOBER 1988

DEESE v. DEESE No. 8819DC437	Cabarrus (87CVD990)	Affirmed
G. & M. APPAREL v. PURVIS CORP. No. 888SC249	Lenoir (86CVS65)	Affirmed
GRiffin v. ROYAL CROWN BOTTLING CO. No. 8710IC451	Ind. Comm. (606269)	Affirmed
IN RE SUGGS No. 8814DC563	Durham (85J158)	Affirmed
IN RE WESTMORELAND No. 8827DC400	Gaston (76J262) (350-87-0849) (350-87-0851)	Affirmed
LOCKLEAR v. POWERS No. 8816SC580	Robeson (85CVS0903)	Affirmed
MOORE v. HENLINE No. 8829SC155	McDowell (85CVS480)	Vacated in part and affirmed in part
STATE v. BULLOCK No. 8818SC428	Guilford (86CRS82576)	Affirmed
STATE v. CROMER No. 8828SC512	Buncombe (87CRS8064)	No Error
STATE v. CROSS No. 8826SC469	Mecklenburg (86CRS100520)	No Error
STATE v. DAUGHTRIDGE No. 884SC449	Sampson (87CRS5274)	Affirmed
STATE v. GRIFFIN No. 8812SC413	Cumberland (87CRS18375)	New Trial
STATE v. GRIFFIN No. 8813SC497	Columbus (81CRS11609)	No Error
STATE v. JOHNSON No. 8827SC502	Gaston (87CR00430)	No Error
STATE v. LANGLEY No. 8811SC495	Johnston (87CRS3170)	No Error
STATE v. PALMER No. 884SC371	Onslow (87CRS7942)	No Error

STATE v. PEGRAM No. 8824SC352	Watauga (86CR4894)	No Error
STATE v. PETERSON No. 8812SC415	Cumberland (86CRS19438)	No Error
STATE v. ROBINSON No. 8813SC548	Bladen (88CRS3247)	Appeal Dismissed
STATE v. ROBINSON No. 8813SC78	Brunswick (87CRS2376) (87CRS2377)	Affirmed
STATE v. SIFFORD No. 8826SC436	Mecklenburg (86CRS86001)	No Error
STATE v. SMITH No. 8829SC523	Henderson (86CRS0347)	Dismissed
STATE v. TUCKER No. 8821SC552	Forsyth (87CRS27890)	Remanded for resentencing
TERRY v. TERRY No. 8810DC118	Wake (86CVD4933)	No Error
WINBON v. CONSUMER CONCEPTS No. 887DC212	Nash (85CVD261)	Reversed

FILED 18 OCTOBER 1988

AVCO FINANCIAL v. BROWNING No. 8815DC333	Alamance (87CVD1818)	Affirmed
BOTTOMLEY v. BOTTOMLEY No. 8823DC398	Wilkes (87CVD107)	Affirmed in part & remanded in part
CARVER v. SMART No. 8825DC290	Catawba (87CVD337)	Vacated & Remanded
DYSON v. DYSON No. 887DC375	Edgecombe (87CVD732)	Vacated & Remanded
HAMPTON v. SIMONDS No. 8830DC395	Swain (87CVD111)	Affirmed
HARRISON v. HARRISON No. 887DC242	Edgecombe (87CVD50)	No Error
IN RE MILLS No. 8818DC369	Guilford (83J213)	Affirmed
SHREVE v. DUKE POWER CO. No. 8817SC380	Rockingham (86CVS1215)	Dismissed

STATE v. BOURQUE No. 8815SC214	Orange (87CRS1173)	Vacated & Remanded
STATE v. CONWAY No. 8828SC198	Buncombe (86CRS2554)	No Error
STATE v. HOSKINS No. 8825SC174	Catawba (86CRS19973)	No Error
STATE v. JONES No. 8825DC115	Catawba (83CR3417)	As to the trial court's activation of defendant's six month criminal sentence — No error; As to defendant's sentence of imprisonment for civil contempt — Reversed and remanded.
STATE v. MARTIN No. 8827SC127	Gaston (87CRS5735)	No Error
STATE v. MOISE No. 884SC329	Onslow (87CRS6569)	No Error
STATE v. SEEGARS No. 8826SC315	Mecklenburg (87CRS30800)	No Error
WILLIAMS v. LEE No. 8826SC338	Mecklenburg (87CVS7532)	Appeal Dismissed

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FREDERICK W. LEWIS, JR. AND JANE B. LEWIS v. CAROLINA SQUIRE, INC.
AND ROBERT F. WARWICK

No. 875DC683

(Filed 18 October 1988)

Contracts § 12.2— sale of map distribution business—cap on amount to be earned by seller—definition of cap ambiguous—parol evidence properly considered

Where plaintiffs sold their map distribution business to defendants and the sales contract limited the amount of sales plaintiffs could make in the final four months of owning the business, the trial court properly considered parol evidence and found, as defendants contended, that the \$115,045.55 cap on "orders placed" was to be based on the final invoice to a customer, which included costs for artwork, preparation, advertising, shipping, taxes, and overruns, rather than on the original customer orders, since that interpretation would allow the parties to know on the day the business changed hands exactly how much of the four months sales receipts plaintiffs could keep and how much would go to defendants; plaintiffs admitted that they knew that the figure for the cap was taken from their "sales receipt journal" for the same four-month period one year earlier, and the "sales receipt journal" reflected gross sales rather than original invoice amounts; the contract itself referred to "the total gross amount of such sales contracts, agreements or purchase orders (hereinafter designated as 'orders placed'))," thus suggesting the parties' intent to use the customer's final invoice as the basis to determine orders placed; and the contract provided that orders not delivered to customers by a date almost three months after closing were to be transferred totally to defendants, which allowed for the time lag between order and shipment, thus indicating an intent to use final invoices to set the cap.

APPEAL by plaintiffs from Rice, Charles E., III, Judge. Judgment entered 18 March 1987 in District Court, NEW HANOVER County. Heard in the Court of Appeals 11 December 1987.

Shipman and Lea by Gary K. Shipman for plaintiff appellants.

Marshall, Williams, Gorham and Brawley by Lonnie B. Williams for defendant appellees.

COZORT, Judge.

Plaintiffs sold their map distribution business to defendants. The sales contract limited the amount of sales plaintiffs could make in the final four months of owning the business. Plaintiffs sued defendants, alleging defendants withheld payments due plaintiffs for map sales made before the business changed hands.

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Defendants counterclaimed, alleging plaintiffs collected more map sales receipts than the contract to sell the business permitted. After a trial without a jury, the trial court interpreted the contract in favor of defendants and awarded judgment for defendants for \$15,519.21. Plaintiffs appeal, contending primarily (1) that the trial court erred in receiving parol evidence to interpret the contract, and (2) that the court's findings of fact are not supported by the evidence. We affirm.

Plaintiffs were the exclusive North Carolina distributor for Champion folding maps manufactured by Champion Map Corporation. Plaintiffs sold custom printed maps in large quantities to banks, real estate companies, chambers of commerce and other customers throughout North Carolina and in certain counties in Virginia and South Carolina. The sales contract provided for a quantity of maps at a unit cost. The sales contract also provided for overruns or underruns not exceeding 10% of the quantity originally ordered. Overruns of ten percent almost always occurred.

After taking an order, plaintiffs did the artwork and prepared the copy for delivery to Champion. Champion manufactured a proof copy and sent it to the customer for approval. After the customer's approval, Champion shipped the quantity ordered, plus any overrun. The cycle between placing the order and shipment of the maps was usually forty-five to sixty days. The original sales contract did not accurately reflect the amount finally invoiced to the customer because the charges for artwork, preparation, and advertising were not known until the order was shipped from Champion. Shipping and taxes were also added to the customer's final bill.

In 1981, defendants began negotiating with plaintiffs to buy plaintiffs' business. A scheduled closing date for the sale was set for 4 January 1982. Defendants were concerned that plaintiffs would "sell out" the territory in the final months of 1981 before closing on the transaction. Many of plaintiffs' customers ordered maps every other year, and fall was the busiest time. Plaintiffs wanted a clean, smooth break from the business. To satisfy both concerns, the parties agreed to cap the amount of sales plaintiffs could make in the final four months of 1981. The pertinent contract provisions provided:

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6. Assignment and Transfer of Existing Contracts, Agreements or Purchase Orders:

(a) As of the date of closing, by written instrument determined to be appropriate by Buyer's attorneys, Sellers shall assign, convey, transfer and set over unto Buyer all of Sellers [sic] right, title and interest in and to all existing contracts, agreements and purchase orders, whether written or oral, made and entered into by Sellers with Champion Map Corporation and with all of Sellers' customers which are executory in nature at the time of closing prior prior [sic] to the date of closing, subject, however, to the provisions of sub-parts (b) and (c) of this paragraph 6.

(b) As to all sales contracts, agreements or purchase orders entered into by Sellers with any customer prior to December 31, 1981, Sellers shall retain all right, title, interest and obligation in, under and to such orders placed by Sellers subject to the following two conditions.

(1) If the total gross amount of such sales contracts, agreements or purchase orders (hereinafter designated as "orders placed") for the period beginning September 1, 1981, and ending December 31, 1981, entered into by Sellers shall exceed the total gross amount of \$115,045.55 then, in such event, Sellers shall assign, convey and transfer over unto Buyer all of Sellers [sic] right, title and interest in all "orders placed" in such excess of "orders placed" at the time of closing. As to such excess of "orders placed" which are transferred to Buyer, Buyer shall assume the responsibility for the payment thereof to Champion Map Corporation. At closing Sellers shall provide to Buyer a written accounting of all "orders placed" during the period September 1, 1981, through December 31, 1981.

(2) If delivery of any "order placed" by Sellers, regardless of when it was placed, shall not be completed by March 31, 1982, then, in such event, Sellers, on April 1, 1982, shall transfer, convey, and set over unto Buyer all of their right, title and interest in and to such unfilled orders and Buyer shall pay to Sellers their costs therein, cost meaning the amount paid by Sellers to Champion Map Corporation within five (5) days of the date of collection by Buyer from

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the customer; provided, however, if the customer shall fail to take delivery, return the merchandise or refuse to pay, though [sic] no fault of Buyer, then Buyer shall have no obligation to pay to Sellers.

(c) As to all sales contracts, orders, purchase orders or sales agreements received by Sellers prior to December 31, 1981, the Buyer shall become the agent of Sellers for the purpose of administering such sales contracts, orders, purchase orders or sales agreements to completion. Buyer shall use its good faith efforts to see that all such sales contracts are completed by proper delivery and that payment for same is appropriately made; however Buyer shall not be responsible to Sellers for any amounts not collected or not paid by any customer. After the date of closing Sellers shall have no further business dealings with any of Sellers [sic] customers except as may be specifically approved by Buyer in advance. As to any funds collected by Buyer for Seller under the terms of this paragraph 6, Buyer shall remit same to Sellers within ten (10) days of receipt by Buyer.

(d) Sellers shall pay in full to Champion Map Corporation when due the cost of all orders taken by Sellers for merchandise ordered by customers. As to any of such orders place [sic] by Sellers prior to December 31, 1981, which, under the terms of this paragraph 6 may subsequently be transferred to Buyer, Buyer shall only be responsible for reimbursing Sellers the cost thereof to Sellers within five (5) days of payment for any such order placed by the customer and if no payment is received by Buyer from customer then Buyer shall have no obligation to reimburse Sellers for such order placed.

(e) Executory in nature as used in subpart (a) of this paragraph 6 shall mean those purchase orders or sales made by Sellers prior to the date of closing but for which no delivery of the purchased merchandise has been made, as of the date of closing, to the customer by Sellers or Champion.

After the closing date, a dispute arose concerning the map sales contracts plaintiffs entered into with customers during the last four months of 1981. Plaintiffs contended that defendants had not forwarded to plaintiffs the correct amount of receipts in ac-

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cordance with the contract. Defendants contended that plaintiffs had sold more than the \$115,045.55 cap provided in paragraph 6.(b)(1) of the contract and that plaintiffs had already collected more receipts than they were allowed under the contract. The crux of the dispute, boiled down to its simplest form, is whether the \$115,045.55 cap on "orders placed" was to be based (1) on the original customer orders, without the cost of artwork, preparation, advertising, shipping, taxes, and overruns, as plaintiffs contended; or (2) on the final invoice to a customer, which included costs for artwork, preparation, advertising, shipping, taxes and overruns, as defendants contended. Much correspondence between plaintiffs and defendants brought them no closer to a resolution of the dispute. Finally, on 31 December 1984, plaintiffs filed suit, alleging among other things, that defendants owed plaintiffs \$7,911.75 in customer payments made on orders placed during the last four months of 1981. In their answer, defendants denied owing plaintiffs any sum. Defendants also counterclaimed, alleging plaintiffs owed defendants because plaintiffs exceeded the cap and collected more receipts than that amount to which they were entitled. In a nonjury trial, the court rendered judgment for defendants and awarded damages of \$15,519.21, plus interest from 28 May 1982. Plaintiffs appeal.

In their first assignment of error plaintiffs contend that the trial judge's findings of fact were not supported by the evidence. Plaintiffs argue generally that the evidence does not support findings which interpret the contract to place a cap on the gross amount of invoices ultimately submitted to customers. Specifically, plaintiffs object to the following findings:

3. In order to protect themselves, the defendants required and plaintiffs agreed that the total sales which the plaintiffs would be entitled to receive during the period September 1, 1981 through December 31, 1981, would not exceed the total sales as shown in plaintiffs' journal during the period September 1, 1980 through December 31, 1980. All sales over that amount would belong to defendants.

4. Defendants computed the total sales recorded in plaintiffs' cash or sales journal for the period September 1, 1980 through December 31, 1980, to be \$115,045.55, PLAINTIFFS' EXHIBIT 4. That figure represented the total receipts from

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sales made during the four month period including overruns, customized art work, freight charges and sales tax, and plaintiffs knew what the figure computed by defendants represented.

* * *

8. From the language of the Contract it was the intention of the parties that "Orders placed" as defined in the Contract meant the total sales amount resulting from all orders received during the four month period as determined upon completion and delivery by the invoices of such sales.

The standard of review for findings of fact in nonjury trials is limited. The findings have "the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975).

Plaintiffs and defendants offered evidence of what the term "orders placed" represented in the contract. Plaintiff Frederick B. Lewis testified that the \$115,045.55 cap was directed at the original sales contract figures, not the later gross invoice figures, which would allow plaintiffs and defendants to know on 4 January 1982, the day the business changed hands, exactly how much of the September-December 1981 sales receipts plaintiffs could keep and how much would go to defendants. Plaintiff Lewis thought defendant Robert F. Warwick agreed with that interpretation at the time. Plaintiff Lewis testified that the cap referred to the amounts as reflected on the purchase orders on the date the order was initiated by the customer. He admitted on cross-examination that the contract did not make that specific statement. He also admitted on cross-examination that he knew that the figure for the cap—\$115,045.55—was taken from his "sales receipt journal" for the period September through December 1980. The "sales receipt journal" reflected "gross sales" and not just original invoice amounts.

Defendant Warwick testified that he and plaintiff Lewis agreed to use the four months of plaintiffs' "sales" from the previous year as the cap. They added up the sales figures from the sales journal and came up with \$115,045.55. Warwick testified

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that the language in the contract—"sales contracts, agreements or purchase orders"—was intentionally broad to cover final invoices and any other type of agreement between plaintiffs and map customers to cover *all* sales for that period of time. They were trying to identify the four month "gross sales" figure, not just the "orders placed" figure. Defendant Warwick further testified that they used the figures from the sales journal to establish the cap because they were dealing specifically with gross sales. He testified that Lewis agreed at the time that the cap was based on gross sales and that Lewis later changed his opinion.

We believe there is support in the evidence for the findings made by the trial court and the interpretation of the contract made by the trial court. There is evidence to support the interpretation urged by plaintiffs; however, it was the trial court's duty as finder of fact to resolve the conflicts in the evidence.

We find further support for the trial court's findings by analyzing carefully the words in the contract provisions in dispute.

The definition of "orders placed" in the contract suggests that the parties intended to use the final amount invoiced to the customer to determine the amount of sales. Referring to "orders placed," the contract provided: "the *total gross amount* of such sales contracts, agreements or purchase orders (hereinafter designated as 'orders placed')."¹ (Emphasis added.) The words "total" and "gross" suggest the parties' intent to use the customer's final invoice as the basis to determine orders placed.

The use of plaintiffs' sales journal from the previous year to set the cap supports the trial court's interpretation. Plaintiffs knew the \$115,045.55 figure was the total of plaintiffs' "gross sales" for the last four months of 1980 taken from plaintiffs' own cash receipts journal. Plaintiffs' Exhibit 4 broke down the sales for the last four months of 1980 into various columns. Column 1 was captioned "Gross," meaning gross sales. Plaintiff testified that he knew defendants simply added the "Gross" figures from Column 1 for September, October, November, and December, 1980, to arrive at the \$115,045.55 cap.

Plaintiffs' restrictive definition of orders placed ignores a key provision of the contract. The contract provided that orders not delivered to customers by 31 March 1982 were to be transferred

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totally to defendants. The parties knew the number of maps originally ordered as of the closing date, 4 January 1982. They did not know the customer's final invoice, especially for orders received in December 1981, because the time lag between order and shipment was forty-five to sixty days. The costs of artwork, preparation, and advertising were not fixed until the customer returned an approved copy to Champion. Since the cutoff date allowed for the time lag between order and shipment, and during that time all costs became fixed and were invoiced, there is support for finding the parties intended to use final invoices to set the cap. Otherwise the final cutoff date would have been 4 January 1982 instead of 31 March 1982.

In sum, we find the evidence supports the challenged findings of fact and find no merit to plaintiffs' first assignment of error.

In their second assignment of error, plaintiffs contend the trial judge erred by allowing parol evidence to determine the contract's meaning. In support of this assignment, plaintiffs refer to the trial court's conclusion of law which reads: "2. The language of the contract was clear and unambiguous." We find the court made a nonreversible error in concluding the contract was clear and unambiguous, and we further find the trial court did not err in admitting parol evidence to ascertain the intent of the parties.

When contract language is clear and unambiguous, it should be given effect. *Olive v. Williams*, 42 N.C. App. 380, 383, 257 S.E. 2d 90, 93 (1979). Courts should not under the guise of judicial construction supply key terms omitted by the parties. *Id.* But "[i]f the writing leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent to show and make certain what was the real agreement." *Robinson v. Benton*, 201 N.C. 712, 713, 161 S.E. 208, 209 (1931). We find the term "orders placed" to be ambiguous because the parties did not specify precisely how the number of orders would be calculated in relation to the sales cap. The trial judge was correct in accepting testimony from plaintiffs and defendants to determine what the term meant.

Having found that the trial court correctly accepted parol evidence, we do not find its erroneous conclusion to be reversible error. The harmless error rule stems from a notion of judicial economy: a judgment should not be reversed because of a techni-

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cal error which did not affect the outcome at trial. *Whitley v. Richardson*, 267 N.C. 753, 755, 148 S.E. 2d 849, 851 (1966). The test for granting a new trial is whether there is a reasonable probability that at the new trial the result would be different. The burden of proof to show prejudice is on the objecting party. *In re Norris*, 65 N.C. App. 269, 274, 310 S.E. 2d 25, 29 (1983), cert. denied, 310 N.C. 744, 315 S.E. 2d 703 (1984).

We believe there is no reasonable probability of a different result at a new trial. In this nonjury trial, wide discretion was given both parties to put on evidence. Both plaintiffs and defendants availed themselves of that opportunity. In spite of the erroneous conclusion of law, we believe the trial judge's result is based on competent evidence and is not faulty as a matter of law.

Finally, plaintiffs have argued that the trial court incorrectly awarded interest in the judgment accruing from 28 May 1982, because no breach of contract by plaintiffs occurred. Having found that the trial court did not err in (1) interpreting the contract in defendants' favor and (2) awarding damages to defendants under the contract, we find no merit to this argument. We find 28 May 1982 to be the correct date to begin interest computation because that is the approximate date plaintiffs should have made payments to defendants.

Judgment for defendants is affirmed.

Judges BECTON and EAGLES concur.

Selective Ins. Co. v. NCNB

SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST, PLAINTIFF v. NCNB NATIONAL BANK OF NORTH CAROLINA AND THE STATE OF NORTH CAROLINA, DEFENDANTS, AND NCNB NATIONAL BANK OF NORTH CAROLINA, THIRD-PARTY PLAINTIFF v. AIRBORNE FREIGHT CORPORATION D/B/A AIRBORNE EXPRESS, THIRD-PARTY DEFENDANT

No. 8710SC406

(Filed 18 October 1988)

1. Declaratory Judgment Act § 5— bearer bonds lost by State—actual controversy and basis for declaratory relief stated in complaint—dismissal of complaint improper

Plaintiff's complaint should not have been dismissed for failure to state a claim where (1) plaintiff showed an actual controversy in that plaintiff had securities on deposit with the Commissioner of Insurance which were lost or stolen, loss of the bonds forced plaintiff to pay to have them reissued and to pay for a surety bond, in addition to losing interest which would accrue on the bonds, defendants' neglect was alleged to have caused plaintiff's damages, NCNB denied any wrongdoing, and the State did not answer plaintiff's complaint; and (2) the complaint presented a basis for declaratory relief where plaintiff alleged that the State, in a letter written to NCNB, admitted losing plaintiff's bearer bonds, plaintiff had to execute a surety bond for the State or lose its license to do business, and plaintiff asked for affirmative declaratory relief to declare the surety bond void and to relieve plaintiff of its obligation to the State, and asked for money damages for breach of trust as provided by N.C.G.S. § 58-182.6 and § 58-188.1.

2. State § 5— bearer bonds lost by State—bank's crossclaim—tort claim against State—Industrial Commission proper forum

Where plaintiff alleged that securities which it had on deposit with the Commissioner of Insurance were lost or stolen, NCNB's crossclaim based on the theory that, if NCNB was liable to plaintiff, the State was liable to NCNB for contribution or indemnity because the State's negligence concurred with NCNB's as the cause of the loss of the bearer bonds was a tort claim against the State which must be heard in the Industrial Commission rather than the state court.

Judge WELLS concurring in part and dissenting in part.

APPEAL by plaintiff Selective Insurance Company of the Southeast and defendant NCNB National Bank of North Carolina from *Herring, D. B., Jr., Judge*. Order entered 15 December 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 28 October 1987.

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Petree Stockton and Robinson by Ray S. Farris and J. Neil Robinson for plaintiff appellant, Selective Insurance Company of the Southeast.

Smith Helms Mulliss and Moore by E. Osborne Ayscue, Jr., and Benne C. Hutson for defendant appellant, NCNB National Bank of North Carolina.

Attorney General Lacy H. Thornburg by Assistant Attorney General Angeline M. Maletto for defendant appellee, State of North Carolina.

COZORT, Judge.

Plaintiff sued defendants State of North Carolina (hereinafter State) and the North Carolina National Bank (hereinafter NCNB) when securities plaintiff had on deposit with the Commissioner of Insurance were lost or stolen. The Commissioner required plaintiff to make and maintain deposits of securities as a condition of doing business in North Carolina. In December 1984, plaintiff asked the Commissioner of Insurance to release the deposited securities. To replace these securities, plaintiff agreed to deposit \$500,000 par value, interest bearing, North Carolina State General Obligation Bonds (hereinafter the bearer bonds).

On 19 December 1984, plaintiff instructed NCNB, with whom it had a custodianship agreement, to deposit the bearer bonds with the Department of Insurance (hereinafter the Department). NCNB was instructed to deposit the released securities in the custodian account.

NCNB hired third-party defendant Airborne Freight Corporation to deliver the bearer bonds to the Department of Insurance, which it did on or about 15 January 1985.

In February 1985, NCNB asked the Department if it received the bearer bonds. On 13 February 1985, the Department responded that it received the Airborne package from NCNB but the bearer bonds had been lost or stolen after they were received. The bonds have yet to be found.

To continue to do business in North Carolina, plaintiff had the bearer bonds reissued. As a condition of reissuance, plaintiff executed a surety bond for the State. The surety bond required

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that plaintiff hold the State harmless and indemnify it if the State incurred loss or damage from having to issue the same bonds twice.

In its complaint plaintiff asked for declaratory relief and breach of trust damages against the State. Plaintiff requested that the surety bond be declared void and that plaintiff be relieved of any obligation to the State. In one of its counts against NCNB, plaintiff asked for a declaration of liability under the custodianship agreement for damages plaintiff suffered in securing the surety bond. Plaintiff's second count alleged that NCNB was negligent.

NCNB filed an answer and asserted a crossclaim against the State for contribution and indemnity. (NCNB also filed a third-party complaint against Airborne, which is not at issue in this appeal.)

The State moved to dismiss plaintiff's complaint and NCNB's crossclaim. The motions to dismiss were granted, and plaintiff and NCNB appealed. We reverse the order dismissing plaintiff's complaint, but we affirm the dismissal of NCNB's crossclaim.

[1] Our focus of review for the dismissal of a declaratory judgment action is twofold: (1) whether plaintiff has shown an actual controversy; and (2) whether the complaint presents a basis for declaratory relief. *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234-35, 316 S.E. 2d 59, 62 (1984). "An actual controversy is a jurisdictional prerequisite for a declaratory judgment." *Newton v. Ohio Casualty Ins. Co.*, 91 N.C. App. 421, 422, 371 S.E. 2d 782, 783 (1988). In *Newton*, this court held that since plaintiff's injury was contingent on some future event or occurrence, an actual controversy does not exist. *Id.* In this case the injury to plaintiff has occurred and is measurable. The bonds were lost or stolen and have not been recovered. The loss of the bonds forced plaintiff to pay to have them reissued and to pay for a surety bond, in addition to losing interest which would accrue on the bonds. Defendants' neglect is alleged to have caused plaintiff's damages. NCNB has denied any wrongdoing. Moreover, the State has not answered plaintiff's complaint. The State filed a motion to dismiss, denying that plaintiff has stated a basis for recovery. We find an actual controversy exists.

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The second step of our review is to determine whether plaintiff's complaint presents a basis for declaratory relief. *Harrison*, 311 N.C. at 234-35, 316 S.E. 2d at 62. The allegations of the complaint must be taken as true when the granting of a Rule 12(b)(6) motion to dismiss is reviewed on appeal. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E. 2d 240, 241 (1981). Concerning the standard used to judge whether a 12(b)(6) motion should be granted in a declaratory judgment action, the North Carolina Supreme Court has said:

Demurrsers in declaratory judgment actions are controlled by the same principles applicable in other cases. *Even so, it is rarely an appropriate pleading to a petition for declaratory judgment.* If the complaint sets forth a genuine controversy justiciable under the Declaratory Judgment Act, it is not demurrable even though plaintiff may not be entitled to prevail on the facts alleged in the complaint. This is so because the Court is not concerned with whether plaintiff's position is right or wrong but with *whether he is entitled to a declaration of rights with respect to the matters alleged.* 22 Am. Jur. 2d, Declaratory Judgments, § 91; *Walker v. Charlotte*, 268 N.C. 345, 150 S.E. 2d 493 (1966); *Woodard v. Carteret County*, 270 N.C. 55, 153 S.E. 2d 809 (1967).

Newman Machine Co., Inc. v. Newman, 275 N.C. 189, 194, 166 S.E. 2d 63, 66-67 (1969) (emphasis added), cf. N.C. Gen. Stat. § 1-253. ("Courts . . . shall have power to declare rights . . . whether or not further relief is or could be claimed.") (Emphasis added.)

Plaintiff's complaint presents a basis for declaratory relief. Taking plaintiff's allegations as true, the State, in a letter written to NCNB, admitted losing plaintiff's bearer bonds. Plaintiff had to execute a surety bond for the State or lose its license to do business. Plaintiff asked for affirmative declaratory relief to declare the surety bond void and to relieve plaintiff of its obligation to the State. In its second count plaintiff asked for money damages for breach of trust as provided by N.C. Gen. Stat. § 58-182.6 and § 58-188.1. N.C. Gen. Stat. § 58-182.6 contains language which arguably supports plaintiff's statement of a claim: "For the securities so deposited the faith of the State is pledged that they shall be returned to the companies entitled to receive them." Declaratory judgment is appropriate to declare the construction

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and validity of a statute. *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454, 461, 168 S.E. 2d 389, 394 (1969). Furthermore, N.C. Gen. Stat. § 58-188.1(a) supports plaintiff's allegation that it has stated a claim for breach of trust, because that statute provides that the Commissioner of Insurance holds the bonds deposited with him "in trust." In short, we do not see an absence of law, or of fact, to support plaintiff's claim, or disclosure of a fact that necessarily defeats plaintiff's claim. *Forbis*, 301 N.C. at 701, 273 S.E. 2d at 241. We do not, however, express an opinion on the validity of plaintiff's claim except to say that plaintiff's complaint should not have been dismissed for failure to state a claim.

We now turn to NCNB's appeal concerning the dismissal of its crossclaim against the State.

[2] The issues presented by NCNB's appeal are: (1) whether NCNB's crossclaim is a tort claim against the State; and if it is a tort against the State, (2) whether it should be heard in the Industrial Commission, or as a third-party claim eligible to be heard in state court. We hold that NCNB's crossclaim is a tort claim against the State and must be heard in the Industrial Commission.

NCNB's crossclaim has two counts: one for indemnification and one for contribution. Both counts are based on the theory that if NCNB is liable to plaintiff, the State is liable to NCNB for contribution or indemnity because the State's negligence concurred with NCNB's as the cause of the loss of the bearer bonds. Therefore, NCNB's crossclaim is a "tort claim." See Am. Jur. 2d *Indemnity* § 20, and *Contribution* § 40. Second, NCNB's crossclaim names the State of North Carolina as the crossclaim defendant. NCNB did not name the Commissioner of Insurance or the Department of Insurance as crossclaim defendants. By its terms the Tort Claims Act does not list the State of North Carolina as a covered entity. The Tort Claims Act applies to "tort claims" against "the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the state." N.C. Gen. Stat. § 143-291. However, the Tort Claims Act has been interpreted to cover tort claims against the State of North Carolina itself: "Since the Tort Claims Act provides that tort actions against the State, its departments, institutions, and agencies must be brought before the Industrial

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Commission, it is settled law that the Superior and District Courts of this State have no jurisdiction over a tort claim against the State, or its agencies" *Guthrie v. State Ports Authority*, 307 N.C. 522, 540, 299 S.E. 2d 618, 628 (1983) (emphasis added).

In *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982), the North Carolina Supreme Court held that the State may be joined as a *third-party defendant* in an action for indemnification or contribution in state court. *Id.* at 332, 293 S.E. 2d at 187. NCNB contends that *Teachy* should be extended to allow state courts to hear *crossclaims* against the State for indemnification and contribution.

Teachy is distinguishable. The court in *Teachy* relied heavily on N.C. Gen. Stat. § 1A-1, Rule 14(c), which provides:

(c) *Rule applicable to State of North Carolina.*—Notwithstanding the provisions of the Tort Claims Act, the State of North Carolina may be made a third party under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the Tort Claims Act. (Emphasis added.)

The distinguishing feature between this case and *Teachy* is that in this case there is no express provision that allows tort-based *crossclaims* against the State to be heard in state court. N.C. Gen. Stat. § 1A-1, Rule 13(g), provides that crossclaims may be brought by one coparty against another:

(g) *Crossclaim against coparty.*—A pleading may state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

The Legislature has simply not similarly excepted crossclaims against the State from the Tort Claims Act as it has for third-party claims, cf. *Columbus County Auto Auctions, Inc. v. Aycock Auction Company*, 90 N.C. App. 439, 442, 368 S.E. 2d 888, 890

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(1988). We note that the dissent would find jurisdiction to hear the crossclaim. While we agree that it is logical to extend the holding of *Teachy* to crossclaims, we have construed the statutes as they are written and decline to judicially create another exception to the Tort Claims Act. Statutes waiving sovereign immunity must be strictly construed. *Guthrie*, 307 N.C. at 537-38, 299 S.E. 2d at 627. "The State may be sued in tort only as authorized by the Tort Claims Act." *Id.* at 535, 299 S.E. 2d at 625. Therefore, the superior court had no subject matter jurisdiction over NCNB's crossclaim against the State. We affirm that portion of the judgment dismissing NCNB's crossclaim.

In summary, the portion of the trial court's order granting the State's motion to dismiss plaintiff's complaint is reversed, and the portion of the order granting the State's motion to dismiss NCNB's crossclaim is affirmed.

Affirmed in part, reversed in part, and remanded.

Judge JOHNSON concurs.

Judge WELLS concurs in part and dissents in part.

Judge WELLS concurring in part and dissenting in part.

I concur with the majority that the trial court erred in dismissing plaintiff's claim against the State. I would go one step further, however, and hold that plaintiff has stated a valid claim for relief against the State under the provisions of N.C. Gen. Stat. § 58-182.6 and § 58-188.1.

I dissent from that part of the majority opinion which holds that the trial court properly dismissed NCNB's crossclaim against the State. I would hold that NCNB stated a valid crossclaim and that the trial court had jurisdiction to determine that claim.

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STATE OF NORTH CAROLINA v. ROBERT LEE ARTIS

No. 886SC99

(Filed 18 October 1988)

1. Criminal Law § 86.3; Constitutional Law § 75 – entrapment raised by defendant – cross-examination about prior drug sale – privilege against self-incrimination waived

Where defendant raised the issue of entrapment by his own testimony, he waived his privilege against self-incrimination regarding a prior sale of cocaine to an undercover SBI agent. N.C.G.S. § 8C-1, Rule 404(b).

2. Criminal Law § 102.8 – jury argument – comments about defendant's "taking the Fifth" – no improper comment on defendant's refusal to testify

Where defendant continued to assert a privilege not to answer questions regarding a prior cocaine sale after the trial court had ruled no privilege existed, the district attorney's comments during closing argument concerning defendant's "taking the Fifth" were not improper comments on defendant's decision not to testify but rather were directed at defendant's improper attempt to assert the privilege.

3. Criminal Law § 99.5 – statement by court – no expression of opinion about defendant's evidence

Defendant was not prejudiced by the court's statement, "We have entertained a lot of irrelevant evidence that nobody objected to," since that comment was directed at the State's repetitious and irrelevant questions rather than at defendant's evidence or witnesses.

4. Criminal Law § 138.14 – three mitigating factors outweighed by one aggravating factor – no abuse of discretion

In a prosecution of defendant for possession with intent to sell and deliver cocaine, the trial court did not abuse its discretion in determining that the one aggravating factor of a prior conviction outweighed three mitigating factors and in imposing a term of imprisonment greater than the presumptive sentence.

5. Criminal Law § 138.14 – sentence greater than presumptive term – failure to find aggravating and mitigating factors – error

Where the presumptive sentence for sale of cocaine was three years, but the trial court imposed a prison term of ten years, the court was required to find factors in aggravation and mitigation, and it was not sufficient that the court made such findings as to the possession conviction.

APPEAL by defendant from *Griffin (William C., Jr.), Judge*. Judgment entered 2 September 1987 in Superior Court, BERTIE County. Heard in the Court of Appeals 7 September 1988.

Defendant was found guilty by a jury of the possession with intent to sell and deliver cocaine and of the sale of cocaine in

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violation of G.S. 90-95(a)(1). Judgments were entered sentencing defendant to prison terms of five and ten years to be served consecutively. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Elizabeth G. McCrodden, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

SMITH, Judge.

Defendant brings forward five assignments of error. First, he contends the trial court erred by refusing to allow him to assert his constitutional privilege against self-incrimination in response to questions asked during cross-examination. In a related assignment of error, he contends the trial court erred by allowing the district attorney to comment during closing argument on defendant's attempt to assert this privilege. Next, defendant assigns error to the trial court's comment on certain portions of the evidence in the presence of the jury. Defendant's final assignments of error relate to the sentences imposed. He contends the trial court abused its discretion in determining that the aggravating factor outweighed the mitigating factors. He also assigns error to the imposition of a sentence in excess of the presumptive term on the conviction for the sale of cocaine as the court did not make separate findings of aggravating and mitigating factors for this offense. We hold that defendant received a fair trial, free from prejudicial error. However, we remand for resentencing on defendant's conviction for the sale of cocaine.

The State's evidence tended to show that State Bureau of Investigation Agent K. L. Bazemore arranged through an informant, Basil Harden, to purchase approximately one and one-half ounces of cocaine from defendant. The purchase took place at approximately 2:30 p.m. on 20 March 1987 in a parking lot at the intersection of U.S. 13 and N.C. 42 in Powellsboro, Bertie County, North Carolina. Defendant testified on his own behalf that Basil Harden asked defendant several times to arrange a sale because Basil Harden needed money and was being threatened by "his brother-in-law." During this undercover operation, Agent Bazemore was posing as Harden's brother-in-law. Defendant stated that he had no idea of selling cocaine before Basil Harden

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approached him and that he only went through with the sale because he wanted to help a friend. On cross-examination, the district attorney asked defendant about a prior sale of cocaine to Agent Bazemore on 13 February 1987 in Hertford County. Defendant refused to answer on the ground that his answer might incriminate him. The trial court ordered defendant to answer. Defendant again sought to invoke his privilege against self-incrimination, and the court again ordered him to answer. Defendant then admitted the 13 February sale. Agent Bazemore, recalled to the witness stand on rebuttal, testified to the 13 February sale.

[1] Defendant assigns error to the ruling requiring him to answer questions regarding the 13 February sale. Before the North Carolina Rules of Evidence were adopted, cross-examination to impeach was not limited to conviction of crimes; a witness could be asked about any act which tended to impeach his character. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973); *State v. Sims*, 213 N.C. 590, 197 S.E. 176 (1938). Thus, our courts held that by electing to testify in his own behalf a defendant surrendered his privilege against self-incrimination and was subject to impeachment by questions relating to specific acts of criminal and degrading conduct. *State v. Foster*, *supra*. Defendant contends the Rules of Evidence now limit the scope of cross-examination to prohibit introduction of "bad acts" not alleged in the indictment upon which he is being tried and that to require him to answer the questions violates his privilege against self-incrimination. We disagree.

Under the former practice, a witness could "be cross-examined for impeachment purposes regarding *any* prior act of misconduct not resulting in conviction so long as the prosecutor had a good-faith basis for the questions." *State v. Morgan*, 315 N.C. 626, 634, 340 S.E. 2d 84, 89 (1986) (emphasis original). By choosing to testify, a defendant was, and still is, "subject to cross-examination as other witnesses." G.S. 8-54. A defendant, then, waived his privilege against self-incrimination regarding "bad acts" when he elected to testify. *State v. Foster*, *supra*. Applying this rule of a defendant's waiver of the privilege to the extent of permissive cross-examination under the current Rules of Evidence, we find the trial court did not err in rejecting defendant's claim of privilege. G.S. 8C-1, Rule 404(b), which generally excludes evidence of other crimes, wrongs or acts, expressly allows

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such evidence to prove absence of entrapment. Defendant testified on direct examination that he had no idea of selling cocaine until he was approached by the informant, Basil Harden. By his testimony, defendant raised the issue of entrapment. Rule 404(b) allows the State on cross-examination to question defendant concerning the prior sale to Agent Bazemore to prove absence of entrapment. Thus, defendant's privilege against self-incrimination was not violated by the questions. This assignment of error is overruled.

[2] In a related assignment of error, defendant contends the trial court erred by allowing the following comment during the district attorney's closing argument to the jury: "[Defendant] says you can believe him. That's the man he says you can believe. This is the man who says you can believe him when he gets the question and says I take the Fifth. You can believe me, the role model for Ahoskie? I take the Fifth." Defendant contends the comment infringes on his privilege to be free from self-incrimination, including comment on the exercise of his privilege, in violation of the principles of *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229, *reh'g denied*, 381 U.S. 957, 14 L.Ed. 2d 730, 85 S.Ct. 1797 (1965). We disagree. Defendant continued to assert a privilege not to answer questions regarding the 13 February sale after the trial court had ruled no privilege existed. The district attorney's comments were not an improper comment on defendant's decision not to testify but rather were directed at defendant's improper attempt to assert the privilege.

[3] Defendant next contends the trial court erred by commenting on certain portions of the evidence in the presence of the jury. During the State's recross-examination of defendant's adverse witness Basil Harden, the following exchange took place among the court, the witness, the district attorney (Mr. Beard), and defendant's attorney (Mr. Martin):

COURT: Haven't we been over that Mr. Beard? Didn't you answer that question earlier Mr. Harden?

MR. HARDEN: Yes.

COURT: Do you have any further questions?

MR. BEARD: No your Honor, not in view of the comments of the Court, no.

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COURT: If you have another relevant question, you may ask him.

MR. BEARD: I don't have any other questions, Your Honor.

MR. MARTIN: YOur [sic] Honor, in your discretion [sic], will you tolerate another question?

COURT: No, it's five o'clock.

MR. MARTIN: I understand.

COURT: We have entertained a lot of irrelevant evidence that nobody objected to.

Following the exchange, the court took an evening recess. Defendant objects to the court's comment that it had "entertained a lot of irrelevant evidence that nobody objected to." Defendant contends this comment "was an improper expression of opinion on the evidence by the trial judge that prejudiced the defendant's right to a fair trial." Defendant did not bring this error to the attention of the trial court as required by G.S. 15A-1446. However, it is apparent that even had defendant properly objected, he would not be entitled to relief on these grounds. It is true that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." G.S. 15A-1222. In deciding whether defendant was prejudiced by the remark, we must consider the comment in light of all the facts and circumstances. *State v. Wilhelm*, 59 N.C. App. 298, 296 S.E. 2d 664 (1982), *disc. rev. denied*, 307 N.C. 702, 301 S.E. 2d 395 (1983). Viewing the comment in context, it appears that it was directed at the State's repetitious and irrelevant questions rather than at defendant's evidence or witnesses. We find no error entitling defendant to a new trial.

[4] Defendant's final assignments of error relate to sentencing. As to the possession conviction, the court found as an aggravating factor that "defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement" and as mitigating factors that "[t]he victim was more than 16 years of age and was a voluntary participant in the defendant's conduct," that "defendant acted under strong provocation," and that "defendant has been a person of good character or has had a good reputation in the community in which he lives."

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Finding that the aggravating factor outweighed the mitigating factors, the court imposed a five-year term, two years in excess of the presumptive term, and a \$10,000.00 fine. Defendant contends the trial court erred in its determination that the one factor in aggravation outweighed the three factors in mitigation. We disagree.

A trial court may 'properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa.' *State v. Ahearn*, 307 N.C. 584, 596-97, 300 S.E. 2d 689, 697 (1983). The weight to be given mitigating and aggravating factors is a matter solely within the trial court's discretion, and the balance struck by the trial court will not be disturbed if supported by the record. *Id.*

State v. Penley, 318 N.C. 30, 52, 347 S.E. 2d 783, 796 (1986). Defendant has not shown an abuse of discretion. This assignment of error is overruled.

[5] As to the conviction for the sale of cocaine, the court imposed the maximum ten-year term and a \$10,000.00 fine. The court concluded that the prison term imposed did not require findings of factors in aggravation and mitigation. Defendant contends the trial court erred by failing to make such findings for this offense. We agree. G.S. 15A-1340.4(b) requires the trial court to "specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence" if the court imposes a prison term for a felony that differs from the presumptive term. Conviction for the sale of cocaine is a Class H felony which has a presumptive term of three years. As the trial court imposed a ten-year sentence, findings of factors in aggravation and mitigation were required. It is not sufficient that the court made such findings as to the possession conviction. "[I]n every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense . . . must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense," *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689, 698 (1983), unless it is clear from the judgment and commitment form for each offense that the court intended the set of factors to apply to both convictions. *State v. Fletcher*, 322 N.C. 415, 368 S.E. 2d

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633 (1988). As the court specifically found that no findings were necessary for the sale of cocaine conviction, we vacate the judgment imposing the ten-year sentence and remand for resentencing.

As to defendant's trial, no error.

As to the sentencing for possession of cocaine, no error.

As to the sentencing for the sale of cocaine, vacated and remanded.

Judges ORR and GREENE concur.

LINDA S. SUTTON v. MAJOR PRODUCTS COMPANY, TAYLOR AND SLEDD, INC., AND N & W FOOD SERVICE, INC.

No. 888SC261

(Filed 18 October 1988)

1. Sales § 22— potato whitener— injury to user— failure to show defect in product

In plaintiff's action to recover for personal injuries resulting from the alleged negligence of defendant manufacturer of "potato whitener," plaintiff failed to show a defect in the product at the time it left defendant's plant where defendant offered evidence by affidavit that approximately one-third of the contents of the jar had been used in small amounts on several occasions without any injuries or occurrences similar to those alleged, and plaintiff failed to come forward with any evidence to rebut defendant's affidavit.

2. Uniform Commercial Code § 12— manufacturer of potato whitener— breach of implied warranty of merchantability claim— injured employee barred by statute from bringing action

Plaintiff's breach of implied warranty of merchantability claim against defendant manufacturer of potato whitener was barred by N.C.G.S. § 99B-2(b), since plaintiff's employer purchased the potato whitener for use in its store, plaintiff used the product in her work, plaintiff was covered by the Workers' Compensation Act, and plaintiff was therefore disqualified by the statute from being a claimant on an implied warranty theory against a manufacturer.

3. Uniform Commercial Code § 12— distributors of potato whitener— no known dangers— claim for breach of implied warranty of merchantability properly dismissed

Plaintiff's claims against defendant distributors of a potato whitener for breach of implied warranty of merchantability were properly dismissed since

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defendants were merely conduits of the product and therefore liable for injuries caused by known dangers; the ingredient in the product which plaintiff alleged caused her injuries, sodium bisulfate, is listed by the USFDA as a product generally recognized as safe; and plaintiff alleged that defendants had actual or constructive knowledge of the dangerous propensity of the product they distributed, but none of her allegations were substantiated.

APPEAL by plaintiff from *Llewellyn, Judge*. Judgments entered 9 November 1987, 12 November 1987, and 24 November 1987 in Superior Court, LENOIR County. Heard in the Court of Appeals 1 September 1988.

Plaintiff was employed at a grocery store and was working there when she alleges she was injured by inhaling noxious fumes from "potato whitener" containing sodium bisulfate. Plaintiff allegedly suffered severe throat pain, loss of voice, and decreased lung capacity as a result of the exposure. Plaintiff filed suit against the manufacturer of the potato whitener, Major Products Co., and distributors, Taylor and Sledd, Inc. and N & W Food Service, Inc. alleging negligence and breach of implied warranty of merchantability. The trial court granted summary judgment in favor of all defendants. Plaintiff appeals.

Barnes, Braswell, Haithcock & Warren, by R. Gene Braswell and S. Reed Warren, for plaintiff-appellant.

Wallace, Morris, Barwick & Rochelle, by F. E. Wallace, Jr., for defendant-appellee N & W Food Service, Inc.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson and Howard M. Widis, for defendant-appellee Taylor and Sledd, Inc.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Grady S. Patterson, Jr., for defendant-appellee Major Products Company.

EAGLES, Judge.

On a motion for summary judgment the question before the court is whether the pleadings, discovery documents and affidavits, viewed in the light most favorable to the non-movant, support a finding that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). *Frendlich v. Vaughan's Foods*, 64

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N.C. App. 332, 307 S.E. 2d 412 (1983). "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E. 2d 363, 366 (1982). If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to come forward with specific facts showing there is a genuine issue for trial. G.S. 1A-1, Rule 56(e).

I

Plaintiff alleges that the manufacturer, Major Products Company, was negligent in (1) introducing into the stream of commerce a product not suitable for the ordinary uses for which it was intended, (2) supplying a product which is unreasonably dangerous due to its defective and negligent makeup, (3) failing to warn of a potentially dangerous chemical and the problems it can cause, (4) failing to place warnings on the label of the potentially dangerous nature of the product, and (5) failing to discover possible defects or dangerous propensities of the product.

[1] In an action to recover for personal injuries resulting from manufacturer's negligence, plaintiff must present evidence which tends to show that the product manufactured was defective at the time it left the defendant-manufacturer's plant, and that the defendant-manufacturer was negligent in its design of the product, in its selection of materials, in its assembly process, or in inspection of the product. *Cockerham v. Ward*, 44 N.C. App. 615, 619, 262 S.E. 2d 651, cert. denied, 300 N.C. 195, 269 S.E. 2d 622 (1980). Here, defendant offered evidence by affidavit that approximately one-third of the potato whitener jar's contents had been used in small amounts on several occasions without any injuries or occurrences similar to those alleged by plaintiff. From defendant's evidence the only logical inference is that the product was not defective when first opened. Plaintiff had the burden then of coming forward with evidence to rebut defendant's affidavit tending to show that this jar of potato whitener had been opened and re-opened and used several times before the incident without any injury. Because plaintiff failed to forecast evidence of a defect in the product in existence at the time the product left Major Prod-

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ucts' plant, summary judgment in favor of Major Products was properly allowed in the negligence claim.

[2] Plaintiff also alleges that Major Products breached its implied warranty of merchantability by producing, manufacturing and distributing a product unsuitable for the ordinary purposes for which it is used. Plaintiff's breach of implied warranty of merchantability claim against Major Products is barred by G.S. 99B-2(b). G.S. 99B-2(b) lists as a claimant a buyer, a member or guest of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer not covered by workers' compensation insurance. The statute therefore limits the class of individuals who may bring a product liability action against a manufacturer for breach of implied warranty of merchantability. It is undisputed that plaintiff's employer purchased the potato whitener for use in the store, that plaintiff used the product in her work, and that plaintiff is covered by the Workers' Compensation Act. Since plaintiff is disqualified by statute from being a claimant on an implied warranty theory against the manufacturer, Major Products' motion for summary judgment on the implied warranty claim was properly granted.

II

[3] In plaintiff's claims against the distributors Taylor and Sledd, Inc. and N & W Food Service, Inc., she alleges that defendant distributors were negligent and breached their implied warranty of merchantability. Plaintiff's negligence claim is based on defendants' introducing into the stream of commerce a product not suitable for the ordinary uses for which it was intended, unreasonably dangerous due to its makeup, and in failing to warn of the "dangerous nature" of the product's "particular threatening characteristic." Liability of a distributor or seller of goods depends on whether the seller knew or by the exercise of reasonable care, could have discovered the dangerous character or condition of the goods. Restatement (Second) of Torts section 402 (1977).

Here the uncontested evidence is that sodium bisulfate, the active ingredient in this potato whitener, is listed by the United States Food and Drug Administration as a product generally recognized as safe. It is commonly used as a food preparation and preservation agent. In addition, there was evidence that

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analysis of the jar of potato whitener involved here revealed that essentially no decomposition or change of the jar's contents had occurred. Because the product is not patently dangerous or defective, any defect would be characterized as a latent defect.

Where a product has a latent defect, the general rule of liability is that a distributor such as Taylor and Sledd, acting as a mere conduit of the product, is only liable for injuries caused by known dangers. 2A Frumer and Friedman, *Products Liability*, section 6.20 (1988). See also *Davis v. Siloo, Inc.*, 47 N.C. App. 237, 247, 267 S.E. 2d 354, cert. denied, 301 N.C. 234, 283 S.E. 2d 131 (1980). By affidavit of its vice president Taylor and Sledd stated that they obtained the potato whitener in closed and sealed cartons, each carton containing six large jars of the product. These cartons were warehoused until an order was received and the unopened cartons were then shipped intact to purchasers. Taylor and Sledd was therefore a mere conduit of the product. Plaintiff alleged that Taylor and Sledd had actual or constructive knowledge of the dangerous propensity of the potato whitener it distributed. None of her allegations were substantiated. Consequently, the entry of summary judgment in plaintiff's negligence claim in favor of the defendant Taylor and Sledd was proper.

Defendant N & W Food Service acquired the potato whitener by the case from Taylor and Sledd and sold individual jars to businesses such as plaintiff's employer. N & W Food Service produced evidence that at no time were the jar lids taken off or tampered with; plaintiff did not rebut that evidence with anything more than blanket assertions that jars with screw-top lids do not constitute sealed containers. It is well established that a seller of a product made by a reputable manufacturer, where he acts as a mere conduit and has no knowledge or reason to know of a product's dangerous propensities, "is under no affirmative duty to inspect or test for a latent defect, and therefore, liability cannot be based on a failure to inspect or test in order to discover such defect and warn against it." 2A Frumer and Friedman, *Products Liability* section 6.03[1][a] (1988). This rule is particularly sound where, as here, the product is sold by the supplier in its original, sealed container. See *Ziglar v. E. I. Du Pont De Nemours and Co.*, 53 N.C. App. 147, 280 S.E. 2d 510, cert denied, 304 N.C. 393, 285 S.E. 2d 838 (1981) (gallon jugs holding pesticide are sealed containers). Plaintiff's only evidence concerning N & W's reason to

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know of danger consists of N & W's salesman's affidavit that he told N & W's Vice President "about the problem." From the affidavit it is clear that the "problem" they discussed, however, was not of danger but of an odor, which is not unusual in sulfur-based products. Because plaintiff did not raise a material issue of fact as to whether N & W had knowledge or reason to know of the potato whitener's alleged dangerous propensity, nor as to whether N & W opened the sealed jars, summary judgment on the negligence claim was properly granted to N & W Food Service.

Plaintiff also alleges the defendant distributors breached their implied warranty of merchantability by selling goods which were not "fit for the ordinary purposes for which such goods are used." G.S. 25-2-314(2)(c). In product liability actions arising from breaches of implied warranties, the defenses provided by G.S. 99B-2(a) are also available to seller defendants. *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E. 2d 495, 499 (1987). In this case Taylor and Sledd acquired and sold the product in sealed cartons and there is no evidence that Taylor and Sledd damaged, mishandled or otherwise altered the product. Likewise, defendant N & W Food Service obtained the potato whitener in sealed jars and there is no evidence of damage or alteration of the product caused by N & W. Therefore, G.S. 99B-2(a) is a complete bar to recovery on plaintiff's implied warranty claims against Taylor and Sledd and N & W Food Service.

Plaintiff also contends on appeal that G.S. 99B-2 is unconstitutional because it excludes workers covered by the Workers' Compensation Act from the class of plaintiff's which may bring a breach of implied warranty action against the manufacturer, denying them equal protection of the law. Plaintiff argues that the distinction is not rationally related to the accomplishment of a valid legislative purpose. From the record before us, it appears that this constitutional argument was not presented to or considered by the trial court. This Court will not pass upon a constitutional question not raised and considered in the court from which the appeal was taken. *Brice v. Moore*, 30 N.C. App. 365, 226 S.E. 2d 882 (1976).

For the reasons discussed we hold that the trial court's entry of summary judgment for all defendants on all claims should be affirmed.

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Affirmed.

Judges ORR and SMITH concur.

STOKES COUNTY, APPLICANT v. DONALD H. PACK AND WIFE, JEWEL M. PACK; WILLIAM H. JOHNSON; STEPHEN JESSUP; DON LESTER; JAMES HARRIS; PEGGY NICHOLS, RESPONDENTS

IN RE: DONALD AND JEWEL PACK, PETITIONERS

No. 8817SC13

(Filed 18 October 1988)

Municipal Corporations § 30.17—garage and salvage business begun—zoning ordinance enacted—nonconforming use not extended

Where a county zoning ordinance went into effect on 1 March 1983, petitioners at that time had cleared approximately five acres of their ten-acre tract, were operating a garage, and had several salvage vehicles in place, petitioners were entitled to complete their salvage yard on the five acres by adding additional vehicles, since the addition of salvage vehicles in excess of the number in place on 1 March 1983 was not an enlargement or extension of a nonconforming use but rather a mere completion of a project which was partially finished when the zoning regulations became effective; however, the other five acres in petitioners' tract which were not cleared and partially in use as of 1 March 1983 could not be utilized by petitioners in their business as that would be a nonconforming use in violation of the county's zoning ordinance.

APPEAL by petitioners and respondent from *John, Judge*. Order entered 30 October 1987 in Superior Court, STOKES County. Heard in the Court of Appeals 13 September 1988.

The record before us discloses the following: In 1979, petitioners bought a ten-acre tract of land located in Stokes County. At that time, petitioners inquired of county officials as to the zoning laws, and they were told there were none in Stokes County. In 1980, petitioners began clearing part of the tract for a garage and salvage business. In 1982, petitioners began construction of a metal building to be used for automobile repair. Petitioners started using the building at the end of 1982. On 16 August 1982, the Stokes County Board of Commissioners adopted an ordinance providing for the zoning of Stokes County to become effective on

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1 March 1983. This ordinance placed petitioners' property in a district which was zoned as residential and agricultural and did not allow for the operation of a garage and salvage business. As of 1 March 1983, petitioners' garage was in operation, and several cars which were to be used for spare parts were already in place.

After the zoning ordinance was adopted, petitioners continued with the operation of their business. On 28 August 1985, the Zoning Administrator of Stokes County, C. T. Lasley, sent petitioners the following letter:

August 28, 1985

Mr. Donald Pack
4206 Garden Street
Winston-Salem, North Carolina

Dear Mr. Pack:

At the August 5, 1985 meeting of the Stokes County Board of Commissioners your request to rezone five (5) acres from R-A (Residential Agricultural) to M-2 (Heavy Manufacturing) was denied.

Therefore, the salvage yard that you have begun on your property is in violation of the Stokes County Zoning Ordinance. This violation must be corrected with, thirty (30) days from the date of this letter or further legal steps will be taken to correct this situation.

If I can be of further assistance to you, please do not hesitate to contact my office.

Sincerely,
s/C. T. Lasley
C. T. Lasley
Zoning Administrator

CTL/kdw

On 6 December 1985, C. T. Lasley obtained a criminal summons against petitioner, Donald Pack, for the violation of the Stokes County Ordinance and G.S. 14-4. This case came before District Court Judge Jerry Cash Martin on 9 January 1986, and petitioner was found "not guilty not solely because the State of North Carolina failed to prove that the alleged violation was

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willful but the finding of Not Guilty was based on other factors, including but not limited to the Stokes County Zoning Ordinance provision concerning the 'Grandfather Clause.'

On 18 July 1986, petitioner Donald Pack filed an application with the Stokes County Zoning Board of Adjustment appealing the Zoning Administrator's decision of 28 August 1985. After a hearing on the matter, the Board of Adjustment entered an order on 31 July 1986 which provided in pertinent part:

6. *Decision of Zoning Enforcement Officer is:*

- () AFFIRMED
() REVERSED

(X) MODIFIED AS FOLLOWS: (1) No more than twelve vehicles or parts thereof shall be stored on the property as a non-conforming use (section 70.1, Stokes County Zoning Ordinance), and these vehicles and/or parts thereof must be contained in an area of no more than 2,400 square feet as defined by the perimeter of all vehicles or parts thereof. (2) This area shall be located in the open field south of garage as signified by letter D on Zoning Enforcement Officer Exhibit III (Blue Print Map) no closer than fifty (50) feet from the garage.

Both parties petitioned the superior court for a writ of certiorari. These petitions were both allowed. On 30 October 1987, an order was entered by Superior Court Judge Joseph R. John affirming the decision of the Stokes County Zoning Board of Adjustment. Petitioners appealed, and respondent Stokes County cross-appealed.

Stover, Dellinger & Cromer, by James L. Dellinger, Jr., and Anderson D. Cromer, for petitioners.

Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., for respondent.

HEDRICK, Chief Judge.

Article VII of the Zoning Ordinance of Stokes County states in pertinent part:

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General Provisions

Any use of a building or land which does not conform to the use regulations, either at the effective date of this ordinance, or as a result of subsequent amendments is a non-conforming use. Non-conforming uses may be continued, provided they conform to the provisions of Article VII, Section 70.

*Section 70. Continuing the Use of Non-Conforming Land***70.1 Extensions of Use.** Non-Conforming uses of land shall not hereafter be enlarged or extended in any way.

In the case of *In Re Tadlock*, 261 N.C. 120, 134 S.E. 2d 177 (1964), the appellants purchased a ten-acre tract of land in 1957 and immediately began construction of a trailer park. They planned to complete the development in three stages, with each stage to encompass 25 units. At the time that the Charlotte City Council passed a zoning ordinance making the applicants' trailer park a non-conforming use, actual construction was confined to Area 1 of the development. There were 14 units in place, and steps had been taken toward the installation of 11 more sites. Areas 2 and 3 had not been constructed, and these areas were still in the planning stage of development. The Board of Adjustment for the Charlotte Zoning Area ruled that appellants could not "extend a non-conforming use of land" by placing 11 additional units in Area 1 and developing Areas 2 and 3. The superior court affirmed the Board's action. Both the Board and the court based their decision on a zoning ordinance which provided: "A non-conforming open use of land shall not be enlarged to cover more land than was occupied by that use when it became non-conforming." Our Supreme Court held that under the evidence and the applicable rules of law, the appellants were entitled to complete the installation of the 11 additional units in Area 1. "(T)he criterion is whether the nature of the incipient non-conforming use, in the light of its character and adaptability to the use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance." *Id.* at 124, 134 S.E. 2d at 180, citing C.J.S., Vol. 101, "Zoning," Sec. 192, p. 954. The Court further held that "by planning the development in three stages and confining actual construction to Area 1 only, the applicants as to Areas 2 and 3 fall

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within the rule that planning a development alone is insufficient to enlarge a non-conforming use." *Id.* at 125, 134 S.E. 2d at 181.

In the present case, the record discloses that at the time that the zoning ordinance went into effect on 1 March 1983, petitioners had cleared approximately five acres of their tract. They were also operating a garage and had several salvage vehicles in place. Since 1 March 1983, petitioners have continued to bring vehicles to their property in order to operate the salvage yard. We hold that under the evidence petitioners were certainly entitled to complete their salvage yard on the five acres by adding the additional vehicles. The addition of salvage vehicles in excess of the number in place on 1 March 1983 was not an enlargement or extension of a non-conforming use of land as is prohibited by Section 70 of the Zoning Ordinance of Stokes County, but rather it was the mere completion of a project which was partially finished when the zoning regulations became effective.

We further hold that the other five acres in petitioners' ten-acre tract that were not cleared and partially in use as of 1 March 1983 may not be utilized by petitioners in their garage and salvage business. This would be a non-conforming use and as such would violate Section 70 of the Zoning Ordinance of Stokes County. Such an enlargement lies within the discretion of the Stokes County Board of Adjustment.

On cross-appeal, respondent Stokes County contends the "Trial Court erred in denying Stokes County's Motion to Dismiss the appeal of Mr. and Mrs. Pack to the Zoning Board of Adjustment since the appeal was not timely filed." In its brief, respondent has failed to set out the exception on which its argument is based, thereby subjecting their appeal to dismissal. Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, in pertinent part, states:

Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal, or the transcript of proceedings if one is filed pursuant to Rule 9(c)(2). Exceptions not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

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Respondent's exceptions to the trial court's ruling are deemed abandoned.

Reversed.

Judges ARNOLD and COZORT concur.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS V. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE INC., AND W. HORACE LOWDER, DEFENDANTS, AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENNELL H. RATTERREE, DAVID P. LOWDER, JUDITH R. LOWDER HARRELL, EMILY P. LOWDER CORNELIUS AND MYRON P. LOWDER, INTERVENING, DEFENDANTS

No. 8820SC286

(Filed 18 October 1988)

Appeal and Error § 13— failure to comply with Rules of Appellate Procedure—frivolous appeal

Defendant's appeal is dismissed where he failed to comply with the Rules of Appellate Procedure, presented many issues which had previously been litigated, had no standing to appeal on behalf of the corporate defendants which were in receivership, and made a frivolous appeal under App. Rule 34.

APPEAL by Horace Lowder (Lowder) on behalf of defendants All Star Mills, Inc. (Mills), Lowder Farms, Inc. (Farms), All Star Foods, Inc. (Foods), All Star Hatcheries, Inc. (Hatcheries) and Consolidated Industries, Inc. (Consolidated) from *Seay (Thomas W., Jr., Judge)*. Orders entered 28 September 1987 and 2 November 1987 in Superior Court, STANLY County. Heard in the Court of Appeals 27 September 1988.

Plaintiffs instituted this shareholder derivative action on 11 January 1979 against Horace Lowder and certain interlocking family corporations alleging that Horace Lowder as chief executive officer and director of the corporations violated the fiduciary duties owed to the corporations and the other

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shareholders. After a jury finding of misappropriation of corporate opportunity by Lowder, permanent receivers were appointed for the corporations. The trial court's subsequent order that the receivers sell the corporations' assets to satisfy liabilities has resulted in numerous appeals by Lowder, including the case at bar.

All Star Mills, Inc., pro se, by W. Horace Lowder, Vice-President.

Lowder Farms, Inc., pro se, by W. Horace Lowder, President.

All Star Foods, Inc., pro se, by W. Horace Lowder, President.

All Star Hatcheries, Inc., pro se, by W. Horace Lowder, President.

Consolidated Industries, Inc., pro se, by W. Horace Lowder, President.

Kluttz, Hamlin, Reamer, Blankenship & Kluttz, by William C. Kluttz, Jr., for receivers-appellees.

SMITH, Judge.

"This is yet another in the series of vexatious . . . attacks on a corporate receivership." *Lowder v. Doby*, 68 N.C. App. 491, 493, 315 S.E. 2d 517, 518, *disc. rev. denied*, 311 N.C. 759, 321 S.E. 2d 138 (1984). We hold that this appeal must be dismissed for any one and all of the following reasons: (1) Lowder has failed to comply with the Rules of Appellate Procedure; (2) many issues presented have been previously litigated; (3) Lowder has no standing to appeal on behalf of the corporate defendants which are now in receivership; and (4) the appeal is frivolous under App. R. 34. We discuss the assignments of error only to the extent necessary to determine that this appeal is frivolous.

The record on appeal in this case does not comply with App. R. 9(b)(1) which requires that items in the record be arranged in chronological order according to date of occurrence or of filing in the trial court. The record before us is, at best, a haphazard arrangement of pleadings, orders and parts of prior records on appeal spanning the almost ten-year period of this litigation. We

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strongly disapprove of the state of the record filed in this court and hold that this appeal must be dismissed for violation of App. R. 9(b)(1).

We also note that there is a total failure to preserve the right of appeal as to several issues discussed in the brief and that these same issues have been before this court on previous occasions. There are no exceptions or assignments of error to support the contention advanced in the brief that the trial court exceeded its jurisdiction by allowing the derivative suit to go forward and that plaintiffs had no standing to maintain this lawsuit. "The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. . . . Exceptions not thus listed will be deemed abandoned." App. R. 10(c).

Further, Lowder's attempts to challenge the appointment of receivers and the trial court's jurisdiction to entertain the original suit are based on judgments and orders previously upheld on appeal in *Lowder v. Mills, Inc.*, 301 N.C. 561, 273 S.E. 2d 247 (1981). In another argument, Lowder contends the trial court erred in ordering liquidation of the corporations' assets. By this argument, Lowder attacks several orders in furtherance of the liquidation and dissolution of the corporations. The order of liquidation and dissolution was affirmed by this Court in *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E. 2d 649, *disc. rev. denied*, 314 N.C. 541, 335 S.E. 2d 19 (1985). The opinions upholding the order appointing receivers, upholding the trial court's jurisdiction and affirming the liquidation and dissolution of the corporations are the law of this case. *Development Corp. v. James*, 58 N.C. App. 506, 294 S.E. 2d 23, *disc. rev. denied*, 306 N.C. 740, 295 S.E. 2d 763 (1982). These opinions are binding in this purported appeal and any subsequent appeal. *Id.*

Lowder also assigns error to the entry of three orders dismissing another appeal to this Court for failure to file and docket the record on appeal within 150 days after notice of appeal. Obviously, the trial court was correct in dismissing the earlier attempt to appeal for failure of Lowder to file and docket the record in this Court within 150 days. App. R. 12(a) and App. R. 25.

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In a further assignment of error, Lowder contends the trial court erred by entering certain orders while another appeal of similar issues was pending before this Court. As to this issue and all other issues Lowder attempts to raise, we hold that Lowder does not have standing to appeal on behalf of the corporations. In reaching this conclusion, we consider both the nature of the corporate receivership and Lowder's rights and interests in the challenged orders. On 5 February 1979, the trial court appointed temporary receivers for the corporations for the duration of the litigation and ordered the receivers to take title and possession of corporate assets, facilities, offices and records. The receivers were ordered to conduct the ordinary business of the corporations and to enter into whatever transactions were necessary to conduct the business. The appointment of the receivers was affirmed on appeal. *Lowder v. Mills, Inc.*, 301 N.C. 561, 273 S.E. 2d 247 (1981). On 25 January 1984, the assets of Foods and Hatcheries were impressed with a constructive trust in favor of Mills. On 30 April 1984, the temporary receivers were made permanent receivers of Farms, Consolidated and Mills, and thus of Foods and Hatcheries by virtue of the constructive trust. On 21 November 1986, the court adopted a plan of complete liquidation and dissolution of Farms which authorized the receivers to sell the assets to meet liabilities and to dissolve the corporation.

"Under our law, it is rudimentary that the only person who may appeal is the 'party aggrieved.'" *Lone Star Industries v. Ready Mixed Concrete*, 68 N.C. App. 308, 309, 314 S.E. 2d 302, 303 (1984). "A party is not aggrieved unless the order complained of affects a substantial right, or in effect determines the action." *Trust Co. v. Motors, Inc.*, 13 N.C. App. 632, 634, 186 S.E. 2d 675, 677 (1972). A receiver appointed by the court represents both the owners and the creditors. *Observer Co. v. Little*, 175 N.C. 42, 94 S.E. 526 (1917). Thus, if a substantial right of the corporations is affected, the permanent receivers are the parties aggrieved. See *Trust Co. v. Motors, Inc.*, *supra*. It stands to reason, then, that after the appointment of receivers is affirmed or becomes final, only the receivers or an attorney representing the receivers may file notice of appeal on behalf of the corporations. Lowder, purporting to act as Vice-President of Mills and President of the other corporations, gave notice of appeal and filed the record and brief on behalf of the corporations. The receivers were, however,

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authorized to take control of the corporations and to assume management. The effect of the appointment of the receivers is to suspend the officers of the company. *Lenoir v. Improvement Co.*, 126 N.C. 922, 36 S.E. 185 (1900). In addition, Lowder was specifically enjoined from interfering with the authority or duties of the receivers and from attempting to manage the affairs of the corporations without the receivers' consent. Thus, Lowder has no authority to pursue this appeal on behalf of the corporations.

Moreover, we find that the appeal by Lowder on behalf of the corporations was "taken frivolously and for purposes of delay." App. R. 34. Lowder has appealed nearly every order entered by the trial court. This is the thirteenth appeal to the appellate division in this case and related cases, not including requests for extraordinary writs. For the most part, Lowder merely reasserts issues previously ruled upon by the appellate division. This appeal is dismissed with costs to be taxed to W. Horace Lowder individually. App. R. 34 and App. R. 35.

Appeal dismissed.

Judges ORR and GREENE concur.

JAMES LETTLEY, EMPLOYEE, PLAINTIFF v. TRASH REMOVAL SERVICE, EMPLOYER; PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8810IC236

(Filed 18 October 1988)

Master and Servant § 55.1, 56— workers' compensation—jumping from cab of truck—back injury—no accident—no causal relation shown between employment and injury

The Industrial Commission properly concluded that plaintiff did not sustain an injury by accident arising out of and in the course of his employment in March 1985 where plaintiff claimed that he jumped from the cab of his truck and experienced a sharp pain in his back, and on the same day plaintiff's back hurt when he bent over to pick up a piece of trash, but the evidence did not show that jumping down from the truck and bending over to pick up trash were not a part of plaintiff's usual work routine, and these events thus did not constitute an "accident" under the Workers' Compensation Act; plaintiff did not sustain a "disabling injury" to his back, N.C.G.S. § 97-2(6), as he continued

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to work until August 1985; the only direct evidence of causation came from an orthopedic surgeon who operated on plaintiff, and his testimony was that plaintiff's condition could have been purely degenerative and caused entirely by normal wear and tear; and other evidence in the case suggested that plaintiff had had earlier, non-work related back problems and had injured his back while working on his car in late spring or early summer of 1985.

APPEAL by plaintiff from Opinion and Award of the Industrial Commission entered 21 October 1987. Heard in the Court of Appeals 8 September 1988.

Plaintiff filed a claim seeking workers' compensation benefits for injuries to his lower back occurring on 30 October 1984 and in March 1985.

Deputy Commissioner William L. Haigh entered an Opinion and Award finding that plaintiff sustained an injury by accident on 30 October 1984 and was temporarily totally disabled from 31 October 1984 to 21 November 1984. The Deputy Commissioner awarded plaintiff compensation for that period, but awarded no compensation for plaintiff's subsequent disability. On appeal to the full Industrial Commission, the Commission affirmed and adopted the Opinion and Award of the Deputy Commissioner. Plaintiff appeals.

James B. Gillespie, Jr., for plaintiff-appellant.

*Johnson & Lambeth, Attorneys, by Robert White Johnson,
for defendant-appellees.*

PARKER, Judge.

Plaintiff brings forward four assignments of error which are grouped together under one argument in his brief. A review of plaintiff's brief reveals that two questions are presented for appellate review: (i) whether the Commission erred in concluding that plaintiff did not sustain a compensable injury in March 1985, and (ii) whether the Commission erred in finding that the evidence failed to establish a causal relationship between either the injury on 30 October 1984 or the incident in March 1985 and the conditions resulting in plaintiff's surgery and ultimate disability.

The evidence in the case tends to show the following: Plaintiff worked for defendant employer as a "front end driver." Plaintiff's job entailed driving a truck and pulling trash containers to

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the front of the truck where they were lifted and emptied into the truck by means of a mechanical apparatus. On 30 October 1984, plaintiff injured his back while pulling an especially heavy container. Plaintiff received medical treatment and was out of work for three weeks. Although he was then able to return to his regular job, plaintiff continued to have problems with his back and he took prescribed pain medication. Sometime in March 1985, plaintiff experienced a sharp pain in his back when he jumped down from the cab of his truck. The same day, plaintiff's back hurt him when he bent over to pick up a piece of trash. At the time of these events, plaintiff did not see a doctor and he continued to work until August 1985. In the summer of 1985, plaintiff was examined by an orthopedic surgeon who diagnosed plaintiff as having a herniated disc, degenerative disc disease, and spinal stenosis, a degenerative condition. Plaintiff underwent surgery on 3 September 1985, at which time the surgeon removed the herniated disc and an area of bone impinging on the spinal canal. Plaintiff has been unable to work since his surgery.

Plaintiff first contends that the Commission erred in concluding that he did not sustain an injury by accident arising out of and in the course of his employment in March 1985. The Commission made the following finding with regard to the events in question:

The evidence fails to establish that there was an interruption of [plaintiff's] regular work routine or that he sustained any disabling injury to his back as a result of jumping from the truck so as to constitute a specific traumatic incident.

The evidence does not show, and plaintiff does not contend, that jumping down from his truck and bending over to pick up trash were not part of his usual work routine. Thus, these events do not constitute an "accident" under the Workers' Compensation Act. *See Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 116, 292 S.E. 2d 763, 766 (1982).

With respect to back injuries, however, the Act provides that a claimant may also receive compensation for an injury resulting from a "specific traumatic incident." G.S. 97-2(6). A specific traumatic incident need not involve unusual conditions or a departure from the claimant's normal work routine. *Caskie v. R. M. Butler & Co.*, 85 N.C. App. 266, 354 S.E. 2d 242 (1987).

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Plaintiff contends that the Commission erred by finding that plaintiff did not suffer a specific traumatic incident because he did not sustain a "disabling injury" to his back. This argument has no merit. Even if a specific traumatic incident occurs, to constitute a compensable "injury by accident" there must be a "disabling physical injury to the back arising out of and causally related to such incident." G.S. 97-2(6). Thus, plaintiff is not entitled to compensation based upon the events of March 1985 unless they caused a disabling injury. Moreover, the Commission also found that there was no causal relationship between the events of March 1985 or the injury of October 1984 and plaintiff's present disability. As plaintiff states in his brief, the causation issue is "the crux of the matter."

The Commission's findings of fact on the issue of causation are conclusive if supported by competent evidence, even where the evidence is conflicting. *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E. 2d 272, 274-75 (1965). If there is no evidence of a causal relationship between the incident and the injury, the claim must be denied. *Id.*

In the present case, the only direct evidence of causation is contained in two depositions of Dr. Carl Unsicker, the orthopedic surgeon who operated on plaintiff. Although Dr. Unsicker testified that plaintiff's condition may have been caused or aggravated by the events of October 1984 and March 1985, he also testified that plaintiff's condition may have been purely degenerative and caused entirely by normal wear and tear. Thus, Dr. Unsicker's testimony was competent evidence to support the Commission's finding.

In addition, other evidence in the case suggests other possible causes of plaintiff's disability. Although he testified that he did not remember having back problems before October 1984, plaintiff admitted that he had seen a doctor for back problems in 1982. Co-workers of plaintiff also testified that his back had been bothering him before the October 1984 accident. Although aggravation of a pre-existing infirmity may be compensable, *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 195-96, 352 S.E. 2d 690, 694 (1987), the claimant still must show that the aggravating injury proximately caused the disability. *Id.* The evidence in this case is consistent with a finding that plaintiff's disability is due

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solely to a degenerative condition and was not proximately caused by an aggravating injury. Finally, we note that there was evidence that plaintiff injured his back while working on his car in the late spring or early summer of 1985, raising the possibility that his disability was the result of an injury that was not work-related.

The Industrial Commission's finding that plaintiff failed to establish that his present disability was caused by a work-related injury was supported by competent evidence and may not be disturbed on appeal. This finding adequately supports the Commission's conclusion that plaintiff is entitled to compensation only for his temporary total disability from 31 October 1984 to 21 November 1984.

Affirmed.

Judges PHILLIPS and EAGLES concur.

STATE OF NORTH CAROLINA v. LILLIE ANN BEAM

No. 8824SC77

(Filed 18 October 1988)

Searches and Seizures § 26— search warrant for defendant's home—affidavit insufficient to show probable cause—week-old information from informant

An affidavit was insufficient to show that probable cause existed for issuance of a warrant to search defendant's residence and evidence seized pursuant to the warrant was properly suppressed where information from a reliable informant showed that defendant possessed one pound of marijuana approximately a week earlier at her home and information from another informant showed that defendant was selling marijuana at an unspecified location the day the warrant was issued; the week-old information was too stale to establish probable cause; and the information concerning sale of marijuana was not shown to be from an informant whose information had proven reliable in the past, nor was the information specific as to location.

APPEAL by the State from *Lamm, Judge*. Order entered 30 September 1987 in Superior Court, MITCHELL County. Heard in the Court of Appeals 6 September 1988.

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Defendant was charged with possession of more than one and one-half ounces of marijuana, possession of marijuana with intent to sell, and possession with intent to use drug paraphernalia. Defendant made a motion to suppress evidence seized at defendant's home on the ground that the search warrant was not supported by probable cause. The trial court entered an order suppressing evidence seized pursuant to the search warrant. The State appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General David N. Kirkman, for the State.

Watson and Hunt, by Charlie A. Hunt, Jr., for defendant-appellee.

EAGLES, Judge.

Pursuant to defendant's pre-trial motion to suppress, the trial court entered an order suppressing evidence seized in a search conducted in accordance with a search warrant. The court specifically found, among other things: "as a Matter of Law . . . considering the totality of the circumstances, the issuing magistrate, had no substantial basis, based upon the information sworn to before him by Deputy Hollifield set out in the affidavit, for concluding that probable cause existed for issuance of the search warrant to search Defendant's residence." After careful examination of the record before us, we agree and affirm the trial court's ruling.

In order to validate the issuance of a search warrant, probable cause must be established in the affidavit upon which the warrant rests. *Dumbra v. United States*, 268 U.S. 435, 45 S.Ct. 546, 69 L.Ed. 1032 (1925); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972).

Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender.

Campbell at 128-29, 191 S.E. 2d at 755 (citing *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971)).

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In *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984), our Supreme Court adopted the "totality of the circumstances" test enunciated in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), for determining whether probable cause exists for the issuance of a search warrant. Under the totality of circumstances test,

[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.

Gates, supra, 462 U.S. at 238-39, 103 S.Ct. at 2332, 76 L.Ed. 2d at 548. Under this test the question is whether the evidence as a whole provides a substantial basis for concluding that probable cause exists. Although "great deference should be paid a magistrate's determination of probable cause," *Arrington*, 311 N.C. at 638, 319 S.E. 2d at 258, this deference does not translate into an abdication of the court's responsibility to review the magistrate's determination.

In the affidavit included in the application for the search warrant, Deputy Hollifield swore to the following:

[T]he information contained in this application is based upon my personal knowledge and upon factual information I have received from others. A reliable informant who has provided accurate and reliable information in the past and whose information in the past has led to arrest and conviction under the N.C. Controlled Substance Act has told the undersigned that appx. one week ago the informant saw Lilly Ann Beam with appx. 1 pound of marijuana at her home on Ridge Road. Another informant told the undersigned that Lilly Ann Beam sold marijuana to them on 02/07/87. Lilly Ann Beam is on probation for violation of Controlled Substance Act.

In his written application, Deputy Hollifield also gave a description of and directions to the defendant's residence. The trial court

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found the deputy had relayed no information to the magistrate other than what was included in his affidavit and application.

The State argues that, "taken together," the information provided the magistrate was not stale. Contrary to the State's argument, information from a reliable informant showing the defendant possessed one pound of marijuana approximately a week earlier at her home and information from another informant that defendant was selling marijuana at an unspecified location the day the warrant was issued, does not supply a magistrate with a substantial basis for determining there was a fair probability that contraband would be found in defendant's home. There is nothing in the affidavit to support a finding of an ongoing activity of drug selling at defendant's residence. *Cf. State v. King*, 44 N.C. App. 31, 259 S.E. 2d 919 (1979) (large number of persons coming and going from defendant's house corroborated other information concerning ongoing activity); *State v. Arrington*, *supra* (one informant gave information of growing marijuana plants, corroborated by information of a steady flow of traffic by people known to use drugs to and from the premises to be searched is evidence of ongoing activity).

As there is no substantial basis for finding an ongoing activity, the only reliable information that implicates defendant's home was the information that was approximately one week old. In *State v. Goforth*, 65 N.C. App. 302, 307, 309 S.E. 2d 488, 492 (1983), this court said to test the timeliness of a search warrant, "[t]he general rule is that no more than a 'reasonable' time may have elapsed." [Citations omitted.] The test for staleness of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932); *State v. King*, 44 N.C. App. 31, 259 S.E. 2d 919 (1979). Common sense must be used in determining the degree of evaporation of probable cause. *State v. Loucheim*, 296 N.C. 314, 250 S.E. 2d 630 (1979), cert. denied, 444 U.S. 836, 100 S.Ct. 71, 62 L.Ed. 2d 47 (1980).

The subject of this search was not an item expected to be kept for extended periods of time or designed for long-term use. Rather, the item sought was marijuana, a substance which can be easily concealed and moved about, and which is likely to be dis-

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posed of or used. *State v. Lindsey*, 58 N.C. App. 564, 293 S.E. 2d 833 (1982). Under the facts of this case, we find the week-old information was too stale to establish probable cause to search defendant's home.

Although the affidavit on which the search warrant was based also presented more recent information concerning defendant's drug activities, the more recent information was not shown to be from an informant whose information has proven reliable in the past. The more recent information was not specific as to location. Indeed, the week-old information was the only evidence of residential possession by defendant. The fact that defendant has more recent involvement with drug activities does not establish a reasonable inference she possessed drugs at her home at the time the search warrant for her residence was issued.

Accordingly, the order suppressing the evidence seized from defendant's home is affirmed.

Affirmed.

Judges PHILLIPS and PARKER concur.

GLORIA McDONALD, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE MARTIN McDONALD, PLAINTIFF V. VILLAGE OF PINEHURST, DEFENDANT AND THIRD PARTY PLAINTIFF V. MARGARET AGNES LAVERY, THIRD PARTY DEFENDANT

No. 8820DC220

(Filed 18 October 1988)

1. Municipal Corporations § 14.1— duty to trim bushes obstructing streets—city not immune from liability

Defendant city had the positive duty to keep its streets free of unnecessary obstructions, untrimmed shrubs and bushes which obstructed the view of motorists using its streets, and defendant was not immune from civil liability for such negligence.

2. Municipal Corporations § 12.3— procurement of liability insurance—carrier insolvent—waiver of governmental immunity not negated

A waiver of governmental immunity is not negated within the meaning of N.C.G.S. § 160A-485 by the insured's carrier becoming insolvent.

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APPEAL by plaintiff from *Wallace, Judge*. Order entered 5 October 1987 in District Court, MOORE County. Heard in the Court of Appeals 8 September 1988.

Plaintiff's intestate was run over and killed on 18 October 1983 in the Village of Pinehurst by a vehicle that had been struck by a car driven by Margaret Lavery. In suing defendant municipality plaintiff alleged, in gist, that its negligent failure to maintain and prune shrubs adjacent to the streets involved proximately contributed to the automobiles colliding and her intestate's death. Defendant denied the allegations and filed a third-party complaint against Lavery, alleging that her negligence was the sole proximate cause of the death. Later defendant municipality filed an amended answer, alleging, in substance, that: It is immune to plaintiff's suit since maintaining its streets is a governmental function; and it has no insurance coverage that would constitute a waiver of immunity under the provisions of G.S. 160A-485 because its liability insurer, Iowa National Mutual Insurance Company, is insolvent and in the process of being liquidated. The parties agreed to treat the amended answer as a motion for summary judgment, which defendant supported with an affidavit by its manager to the effect that: When the accident occurred the only liability insurance the Village had that was applicable to plaintiff's claim was a policy with Iowa National Mutual Insurance Company and since then that company had become insolvent and its business was being liquidated. The motion was granted and plaintiff's action was dismissed.

Pollock, Fullenwider, Cunningham & Patterson, by Bruce T. Cunningham, Jr., for plaintiff appellant.

Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by W. Lamont Brown, for defendant and third-party plaintiff appellee Village of Pinehurst.

No brief filed for third-party defendant Margaret Agnes Lavery.

PHILLIPS, Judge.

The validity of the order dismissing plaintiff's action depends upon the correctness of the two conclusions of law that the court implicitly drew from defendant's amended answer and affidavit:

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That unless waived by having liability insurance defendant municipal corporation is immune from plaintiff's action; and that defendant's waiver of immunity from civil liability by the purchase of insurance was negated as a matter of law by the insolvency of its insurer. Neither conclusion is correct and the order is erroneous on both grounds.

[1] Plaintiff's action is based upon defendant's alleged negligence in failing to keep its streets free of unnecessary obstructions—untrimmed shrubs and bushes that obstructed the view of motorists using the streets involved—and so far as we can determine municipalities in this State have never been immune from civil liability for such negligence. In all events: Since *Bunch v. Town of Edenton*, 90 N.C. 431 (1884), our law has been that municipalities have the positive duty to maintain their streets and sidewalks in a safe condition and keep them free of unnecessary obstructions and are civilly liable for negligently failing to discharge that duty; at least since 1917, if not earlier, that duty has had legislative sanction through G.S. 160A-296 and its predecessors. This long-established rule of law, though not referred to by plaintiff appellant, requires that the order be set aside. For a discussion of actions that cities are and are not civilly immune from, see *Millar v. The Town of Wilson*, 222 N.C. 340, 23 S.E. 2d 42 (1942); *Hamilton v. City of Rocky Mount*, 199 N.C. 504, 154 S.E. 844 (1930); *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 293 S.E. 2d 235 (1982).

[2] Thus, insofar as this case is concerned defendant had no immunity to waive and the insolvency of its insurer did not affect its liability. But if there had been a waiver it would not have been negated, even though by purchasing liability insurance a municipality waives its immunity only to the extent that it is "indemnified by the insurance contract from tort liability," G.S. 160A-485(a) (emphasis supplied); which means, of course, that upon ceasing to be indemnified by the insurance so obtained the waiver of immunity is negated. This is so because in this State behind every licensed liability insurance company that becomes insolvent is an agency created by G.S. 58-155.46 that, to some extent and under certain conditions, takes over the insolvent's obligations to indemnify its insureds by paying legally entitled claimants. The agency, the North Carolina Insurance Guaranty Association, is comprised of and supported by all liability insurance companies

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that do business in this State; and its main function, subject to limits and conditions that need not be discussed here, is to pay legally entitled claimants what member insurers would have been required to pay had they not become insolvent; and nothing in the record suggests that defendant is not now indemnified from liability to plaintiff by this agency to some extent. Defendant's argument that its waiver of immunity was negated since the indemnification it might still have is not under its contract with Iowa National Mutual Insurance Company is rejected; because the obligations that the Association has to both plaintiff and defendant are traceable to defendant's insurance contract with Iowa National Mutual Insurance Company, and any payment the Association might make to plaintiff would necessarily indemnify defendant to that extent. To hold that a waiver of immunity is negated within the meaning of G.S. 160A-485 by the insured's carrier becoming insolvent would, for no sensible reason, deprive worthy claimants of the legal redress and insurance purchasing municipalities of the indemnification that the statute was enacted to provide.

Vacated.

Judges EAGLES and PARKER concur.

**SHIRLEY ANN WHITT, PLAINTIFF-APPELLANT v. ROXBORO DYEING CO., INC.,
DEFENDANT-APPELLEE**

No. 889DC266

(Filed 18 October 1988)

**Master and Servant § 10.2; Limitation of Actions § 3.2— wrongf ul dis-
charge—statute of limitations extended**

Where plaintiff was allegedly wrongfully discharged on 23 January 1985, and on 8 July 1985 the legislature amended N.C.G.S. § 97-6.1(f) by substituting a one-year limitation period for the previous six-month period in actions for wrongful discharge, the amended statute applied to plaintiff's action commenced on 18 October 1985 so that it was not barred since the statute in question was a statute of limitations rather than a statute containing a condition precedent.

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APPEAL by plaintiff from *Allen (Ben U.), Judge*. Judgment entered 30 November 1987 in District Court, PERSON County. Heard in the Court of Appeals 26 September 1988.

This is a civil action wherein plaintiff seeks damages and reinstatement from her former employer for wrongful discharge in violation of G.S. 97-6.1. The record shows that plaintiff was first employed by defendant in July 1984. On 2 January 1985, she was injured while on the job, was hospitalized, and remained under a physician's care until 22 April 1985. On 23 January 1985, plaintiff instituted a claim under the North Carolina Workers' Compensation Act. On the same day, defendant sent plaintiff a letter terminating her employment. When she was able to return to work on 22 April 1985, she was told she could not return.

On 18 October 1985, plaintiff instituted this action, asserting she was fired because she had made a workers' compensation claim. Defendant answered by alleging the running of the statute of limitations as a bar to the action. Following a hearing, the trial court entered an order dismissing the action on those grounds. Plaintiff appealed.

North Central Legal Assistance Program, by Daniel R. Lauffer, for plaintiff, appellant.

Stubbs, Cole, Breedlove, Prentis & Poe, by Edmund D. Milam, Jr., for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff argues the trial court erred in granting defendant's motion to dismiss because the applicable statute of limitations had been extended by the legislature before plaintiff's claim would have been barred. Before July 1985, G.S. 97-6.1(f) provided the statute of limitations in an action for wrongful discharge because of a workers' compensation claim was six months. Because plaintiff was discharged on 23 January 1985 and did not institute this action until 18 October 1985, she would be barred under the statute as it was before July 1985.

On 8 July 1985, however, the legislature amended the statute substituting a one-year limitations period for the previous six-month period. Because the statute was amended before plaintiff's action would have been barred by the former statute, the ques-

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tion we must decide is whether the period in which plaintiff could bring her action was extended by the amendment.

The legislature may extend at will the time within which a right may be asserted or a remedy invoked so long as it is not already barred by an existing statute. *Stereo Center v. Hodson*, 39 N.C. App. 591, 251 S.E. 2d 673 (1979). Some statutes, however, by their language forever bar actions if not commenced within a certain time period. Our courts have found such provisions to be conditions precedent to actions rather than statutes of limitations, and for that reason have held that the legislature could not extend the time period for commencing actions when the time period had already begun to run. *McCrater v. Engineering Corp.*, 248 N.C. 707, 104 S.E. 2d 858 (1958).

In *McCrater*, our Supreme Court held that under G.S. 97-24 the requirement that an action be commenced within a certain time period was an essential element of the right to maintain a claim for compensation under the Workers' Compensation Act. Although the trial judge in the present case similarly found that the "time limitation bar of six months imposed by G.S. 97-6.1 is a condition precedent to maintenance of the action," G.S. 97-6.1 is clearly distinguishable from G.S. 97-24.

G.S. 97-6.1, the statute now in question, is a wrongful discharge statute while G.S. 97-24 deals solely with workers' compensation. G.S. 97-6.1 also provides specifically for a "statute of limitations," while G.S. 97-24 provides that the "right to compensation . . . shall be forever barred unless a claim be filed . . . within two years after the accident." The legislature was very clear in designating the provision in G.S. 97-6.1 as a "statute of limitations." It could have done otherwise if it had chosen.

In *McCrater*, the Court outlined the characteristics of a statute containing a condition precedent instead of a statute of limitations: (1) one which in itself creates a new liability, (2) one which provides for an action unknown at common law, and (3) one which fixes the time within which the action may be commenced. Although G.S. 97-6.1 and G.S. 97-24 both exhibit the first two characteristics, G.S. 97-6.1 does not exhibit the third characteristic in that it provides the time period for commencement of an action is "pursuant to G.S. 1-54." G.S. 1-54 is a statute of limitations for actions other than those involving real property. G.S. 97-24

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provides its own limitations period and is not pursuant to any other statute. G.S. 97-6.1, therefore, does not fix its own limitations period as does G.S. 97-24.

Because of the explicit language of G.S. 97-6.1 providing for a "statute of limitations . . . pursuant to G.S. 1-54," we hold the statute is a statute of limitations which was extended by the legislature. The trial court erred by granting defendant's motion to dismiss. The action is remanded to the District Court of Person County for further proceedings.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA, EX REL. S. THOMAS RHODES, SECRETARY,
DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT V.
RALPH GASKILL

No. 873SC1125

(Filed 18 October 1988)

APPEAL by plaintiff from *Reid, Judge*. Order entered 19 August 1987 in Superior Court, CARTERET County. Heard in the Court of Appeals 6 April 1988.

Attorney General Thornburg, by Assistant Attorney General J. Allen Jernigan, for the State.

Wheatly, Wheatly, Nobles & Weeks, by C. R. Wheatly, III, for defendant appellee.

PHILLIPS, Judge.

The State brought this action pursuant to G.S. 113-229 and G.S. 113A-126 to compel defendant to comply with the permit procedures of those statutes in connection with the construction of a duck pond upon his property, which the State alleges has destroyed approximately 6,580 square feet of "coastal wetlands" as defined in G.S. 113-230(a). Defendant never applied for a permit to undertake any development of his property and in his answer

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denies that his property is subject to the permit requirements mandated by statute as not being within the definition of coastal wetlands, on which factual issue he demanded a jury trial. The State moved to deny defendant's request for a jury trial and the motion was denied.

The facts governing this appeal are not materially different from those recorded in *State ex rel. Rhodes v. Simpson*, 91 N.C. App. 517, 372 S.E. 2d 312 (1988), and for the reasons stated in that opinion the order appealed from is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

BILLY MATTHEWS, JACK MATTHEWS, LEONARD MATTHEWS, JOSEPHINE BRIDGERS, ELIZABETH BRADLEY, BARTHOLOMEW KIMBALL, MARGARET JONES FOUNTAIN, HUGH SHERROD, ROM SHERROD, NELL ANDERSON, DAPHNE LILES, MILDRED RODGERS, AND ELIZABETH MARSHBURN, PETITIONERS-APPELLANTS v. WILLIAM T. WATKINS, EXECUTOR OF THE ESTATE OF ANNIE MAE S. DAVIS, RESPONDENT-APPELLEE

No. 879SC1089

(Filed 1 November 1988)

1. Clerks of Court § 10; Executors and Administrators § 5 — action to remove executor — testimony of clerk — oral approval of respondent's actions

In an action to have respondent removed as executor of an estate based in part upon allegations that respondent had been in default of his duties as executor, the trial judge did not err by admitting testimony from the clerk of superior court that she had orally approved respondent's actions in several instances. The failure of the clerk to record all or part of a proceeding does not render the proceeding void. N.C.G.S. § 7A-109.

2. Witnesses § 7 — action to remove executor — testimony of clerk — based on written memorandum — refreshing memory

The trial court did not abuse its discretion in an action to remove respondent as executor of an estate by refusing to strike testimony of the clerk of superior court based on a written memorandum concerning services performed by respondent upon which the award of attorney's fees was based where the clerk independently recalled that she had awarded attorney's fees for services performed by respondent, and used the memorandum to specify what the services were. Moreover, the reasonableness of the fee is not at issue

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in this proceeding and the admission of the testimony could not have been prejudicial. N.C.G.S. § 8C-1, Rule 803(5).

3. Executors and Administrators § 37.1— executor's commission—proceeds of sale of real property

The trial court did not err in an action to remove respondent as an executor of an estate by finding that the executor's commissions could be paid on the proceeds of the sale of real property where the property was not sold "to pay debts or legacies" and N.C.G.S. § 28A-23-3(b) is not involved. Moreover, any error would not be grounds for reversal since the amount of the fee is not at issue.

4. Executors and Administrators § 37— employment of law firm mandated by will—justification for payment

The trial judge did not err in an action to revoke Letters Testamentary by concluding that the will mandated that respondent employ his own law firm and that respondent's actions did not constitute default or misconduct, even though the will provision alone does not justify payment of attorney's fees, where there was evidence that some services were provided which justified payment of fees under N.C.G.S. § 28A-23-4 and evidence that the clerk approved the fee. N.C.G.S. § 28A-23-3(a).

5. Executors and Administrators § 37.1— executor's commissions and attorney's fees—conclusion that determination of reasonableness unnecessary—no prejudice

There was no prejudice in an action to remove an executor from the trial court's conclusion of law "that the payment of commissions of \$89,000 being less than ten percent of the receipts and expenditures of the estate . . . , it is not necessary in this proceeding to make a determination as to the reasonableness of said fee" where the conclusion merely confirms that the amount paid was within the amount approved by the clerk, the reasonableness of which was not for consideration in this proceeding.

6. Executors and Administrators § 37.1— attorney's fees—determination of amount

Fees awarded under N.C.G.S. § 28A-23-4 should be for actual services rendered and should not be based solely upon the size of the estate; nevertheless, the size of the estate provides a useful guideline and may be considered as a factor in determining whether legal services were necessary and the time expended justified.

7. Executors and Administrators § 37.1— attorney's fee—award of fee based on percentage of estate—not subject of appeal—no reversible error

There was no reversible error in an action to remove an executor from the award of attorney's fees based on a percentage of the estate because the amount of the fee was not under review on this appeal.

8. Executors and Administrators § 37— award of legal fees—argument that no approval obtained—no error

There was no error in the signing and entry of an order denying a petition to revoke Letters Testamentary, which was based in part on the theory

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that respondent obtained no approval for the payment of legal fees, where the clerk testified that she approved commissions equal to ten percent, with five percent for attorney's fees. The credibility of the testimony is for the trier of fact to decide.

Judge WELLS concurring.

Judge ORR dissenting.

APPEAL by petitioners from *Hobgood (Robert H.), Judge*. Order entered 2 July 1987 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 5 April 1988.

This is a proceeding pursuant to G.S. 28A-9-1(a)(3) to have respondent removed as executor of the Estate of Annie Mae S. Davis. Petitioners are residuary beneficiaries under Ms. Davis's will. Ms. Davis died on 9 April 1985, and her will was admitted to probate on 22 April 1985. The will named respondent as executor and further provided that "my executor shall employ the law firm of Watkins, Finch & Hopper, Attorneys at Law, as the attorneys to assist in the handling and settling of my estate." Respondent is a member of the law firm Watkins, Finch & Hopper. Letters Testamentary were issued to respondent as executor of the Estate of Annie Mae S. Davis on 22 April 1985.

On 12 August 1985, the assistant clerk of superior court issued to respondent a notice that the inventory of the estate required by G.S. 28A-20-1 was due. The inventory was not filed until 21 October 1985. The assistant clerk also issued a notice stating that the annual account was due on 2 June 1986, and the annual account was not filed until 17 June 1987. On 11 December 1985, pursuant to a petition filed by respondent, the clerk of superior court entered an order allowing respondent to pay to himself eighty percent of the commissions to be allowed for administering and settling the estate. On 16 September 1986, respondent filed a petition for the payment of the remainder of the commissions and the clerk allowed payment by order entered the same day.

The annual accounting showed that the following payments were made to the law firm of Watkins, Finch & Hopper: \$65,000 on 2 January 1986, \$4,000 on 30 April 1986, and \$20,000 on 19 March 1987, for a total of \$89,000. These payments included respondent's executor's commission, and the payments were approved by the clerk.

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Petitioners initially filed a petition to revoke respondent's Letters Testamentary on 19 June 1987; thereafter they filed an amended petition on 24 June 1987. The petition alleged that respondent had violated his fiduciary duty through default and misconduct within the meaning of G.S. 28A-9-1(a)(3). Specifically, petitioners alleged that respondent had unlawfully converted sums paid to his law firm, had misrepresented to one of the beneficiaries that respondent was entitled to receive the amounts paid as an executor's commission and attorney's fees, and had been in default of his duties as executor by failing to file the account in a timely manner.

The clerk of superior court entered an order disqualifying herself to hear the petition, and the petition was heard by the senior resident superior court judge pursuant to G.S. 28A-2-3. The judge concluded that respondent was not guilty of default or misconduct in the exercise of his duties and denied the petition to revoke the Letters Testamentary. Petitioners appeal.

Parker and Parker, by Rom B. Parker, Jr., for petitioner-appellants.

Adams, McCullough and Beard, by J. Allen Adams and Heman R. Clark, for respondent-appellee.

PARKER, Judge.

For the reasons discussed herein, we affirm the judge's ruling denying the petition. Petitioners bring forward ten assignments of error. Four of petitioner's assignments of error concern the admission of testimony of the clerk of superior court. Petitioners contend that the testimony was inadmissible as parol evidence of court proceedings. Petitioners also contend that the judge erred in denying their motion to strike part of the testimony on the grounds that it was not based on the witness's own recollection. Petitioners next assign error to the judge's finding that the receipts and expenditures on which the executor's commission was based included proceeds from the sale of real property. Petitioners' remaining assignments of error concern the judge's conclusions to the effect that the payment of attorney's fees to respondent's law firm was not grounds for revocation of respondent's Letters Testamentary.

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At the outset we note that the parties stipulated in open court that the amount or reasonableness of the legal fee was not at issue in this proceeding. The following exchange took place among counsel and the judge:

MR. ADAMS: If the Court please, the respondent as it understood the petitioner has no further evidence, and if the question of the amount of the fee comes before the Court, then we would need time to marshal the evidence and go through that; but we did not understand this proceeding is to question of the amount of the fee but whether or not he was entitled to any fee and illegally took it.

MR. PARKER: I agree with that, Your Honor. In fact, the Courts have held that in a proceeding of this nature it's not the function of the Court to adjust the rights of the parties but simply to determine whether Letters Testamentary should be revoked; and that's really the only issue. The other would come later in a separate matter.

Thus, the sole legal question before the judge at the hearing below was whether respondent was guilty of default or misconduct justifying revocation of his Letters Testamentary and his removal as executor.

In *Jones v. Palmer*, 215 N.C. 696, 698-99, 2 S.E. 2d 850, 852 (1939), our Supreme Court, construing the predecessor of G.S. 28A-9-1, stated:

Such action is usually instigated by the necessity of presently preserving the estate, rather than for punishment or correction of personal representatives.

....

.... The exigencies of administration require the exercise of sound judgment, and this necessarily implies discretion in its supervision. This statute provides for the revocation of letters of administration and the removal of administrators from office upon complaint that the person to whom the letters were issued "has been guilty of default or misconduct in the due execution of his office." If, upon a hearing, "the objections are found valid, the letters issued to such person must be revoked and superseded and his authority shall thereupon cease."

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"Must" denotes imperative action, indeed, but the action becomes imperative only when the conditions upon which it shall be taken are clear and compelling. Before taking action, the clerk must determine the validity of the charges brought against the administrators, and this, . . . includes a finding of their sufficiency to justify removal, in determining which he must exercise his good judgment under the guidance of law and precedent. *In re Battle*, 158 N.C., 388, 74 S.E., 23. While strict supervision is demanded, no matter within the guardianship of the law calls more strongly for the application of sound business principles. Rules do not think; ministerially applied they are manifestly inadequate.

The clerk is not compelled to remove an administrator for failing promptly to file an inventory when in his judgment the estate has received no damage; C.S., 48, 49; nor for failure to file account; C.S., 106; nor for delay in winding up an administration. Instead of removal, the performance of all these duties may be enforced by appropriate proceeding. *Atkinson v. Ricks*, 140 N.C., 418, 53 S.E., 230; *Barnes v. Brown*, 79 N.C., 401. But he may remove an executor or administrator for such failure, and must do so when he finds the omission of duty is sufficiently grave to materially injure or endanger the estate, or if compliance with the orders of the court in the supervision and correction of the administration are not promptly obeyed.

The appeal from the judge of the Superior Court is heard upon matters of law and legal inference. *Wright v. Ball*, 200 N.C., 620, 158 S.E., 192; *In re Will of Gulley*, 186 N.C., 78, 118 S.E., 839. We do not regard the failure of the court below to find facts as material, since upon such facts as might be found from the evidence we cannot find an abuse of discretion.

As stated in *In re Estate of Galloway*, 229 N.C. 547, 50 S.E. 2d 563 (1948):

That is, the question before the clerk is whether the administrator, "has been guilty of default or misconduct in the due execution of his office." G.S. 28-32. In passing upon such question, the clerk exercises a legal discretion which may be reviewed on appeal.

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229 N.C. at 551, 50 S.E. 2d at 566. (Citations omitted.) In this case the clerk of superior court recused herself because of a potential conflict of interest. The resident superior court judge sat in the clerk's stead. On appeal, this Court may not substitute its findings for those of the judge if there is evidence to support the findings of the judge. *In re Estate of Swinson*, 62 N.C. App. 412, 303 S.E. 2d 361 (1983).

[1] Against this background, we now discuss each of petitioners' assignments of error. Petitioners first contend that the judge erred in admitting certain testimony of the clerk, in denying petitioners' motion to strike portions of respondent's answer which were supported by the testimony, and in basing findings of fact and conclusions of law upon the testimony. The testimony in question concerned conferences between the clerk and respondent with regard to the Davis estate.

The testimony was crucial to respondent's defense because it established that the clerk had orally approved respondent's actions in several instances where such approval was required. First, the clerk testified that she had orally granted respondent extensions of time for filing both the inventory and the annual account of the estate. Statutes provide that a personal representative may obtain further time to file inventories and accounts from the clerk of superior court. G.S. 28A-20-2(a); G.S. 28A-21-4.

The testimony was also essential to respondent's explanation of his payments to the law firm. A personal representative is entitled to commissions in an amount not to exceed five percent of the receipts and expenditures, G.S. 28A-23-3(a), and the clerk of superior court may allow commissions during the course of administration. G.S. 28A-23-3(c). An attorney who serves as a personal representative may be allowed counsel fees for services rendered to the estate as an attorney. G.S. 28A-23-4. All commissions and fees must, however, be approved by the clerk. *In re Estate of Longest*, 74 N.C. App. 386, 393, 328 S.E. 2d 804, 809, *disc. rev. denied and appeal dismissed*, 314 N.C. 330, 333 S.E. 2d 488 (1985).

In the present case, the clerk's written orders approved payment of "commissions" but failed to specify the amount. The orders also did not indicate that any attorney's fees had been approved. The total amount paid to the law firm (\$89,000) was slight-

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ly less than ten percent of the total receipts and expenditures (\$956,754.32). Thus, the amount paid clearly exceeded the maximum executor's commission of five percent. The clerk testified that, during a conference with respondent in October or November of 1985, she told him that she would allow the full five percent commission plus an additional five percent of receipts and disbursements as attorney's fees. This testimony established that respondent had obtained verbal authorization from the clerk to pay the amounts shown in the account.

Petitioners contend that the testimony was not admissible to establish the clerk's verbal approval of the commission and fees. Petitioners rely on *State v. Tola*, 222 N.C. 406, 23 S.E. 2d 321 (1942) to argue that the clerk's actions may not be proven by parol evidence. Petitioners also rely on G.S. 7A-109, which requires the clerk to maintain records of court actions, including proceedings in estates.

In *State v. Tola*, the court held that a judgment could not be explained or contradicted by parol testimony. *Tola*, 222 N.C. at 408, 23 S.E. 2d at 323. *Tola*, however, involved a criminal defendant who was seeking to explain a judgment of guilty in support of his plea of former jeopardy, and the defendant was actually permitted to introduce the evidence at trial. *Id.* In addition, the *Tola* court recognized that such testimony would be admissible in a separate proceeding to amend the record. *Id.* at 408-09, 23 S.E. 2d at 323.

We do not find *Tola* to be controlling in the present case. A case more directly on point is *Trust Co. v. Toms*, 244 N.C. 645, 94 S.E. 2d 806 (1956). In *Toms* the beneficiaries of a trust filed a motion seeking to hold the original trustee liable for funds converted by a successor trustee. Although the clerk of superior court had entered an order appointing the successor trustee, the docket did not show that the order was approved by the judge, which was required by statute. The original trustee presented affidavits to establish that the order had been approved by the judge but that the papers showing such approval had been lost, and the motion was denied.

On appeal, the movants contended that the docket was conclusive and could not be supplemented, modified, or corrected. The Supreme Court disagreed:

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The attack here made on the order of resignation is not a collateral attack. It is a motion in the cause in which the court, upon the assertion of respondent that all of the record has not been recorded, has the power and should determine what in fact was done.

It is to provide a permanent record and guard against loss of the original papers that the statute . . . directs the clerk to keep books in which the papers may be transcribed. The failure of the clerk to comply with the statute by neglecting to record all or a part of a proceeding does not render the proceeding void. Any interested party may, by motion, require the proceeding to be recorded The power of a court to make its records speak the truth cannot be doubted. To hold otherwise would make a mockery of justice.

Trust Co. v. Toms, 244 N.C. at 649-50, 94 S.E. 2d at 810.

Like the respondent in *Toms*, respondent in this case introduced parol evidence to demonstrate that his actions had been approved by the court. Accordingly, we find no error in the admission of the clerk's testimony.

[2] Petitioners next contend that the judge erred in permitting the clerk to base some of her testimony on a written memorandum. The testimony in question concerned the services performed by respondent upon which the clerk based the award of attorney's fees. The record discloses that the clerk prepared a list of such services after reviewing the estate file and the answer filed by respondent in this case; she testified from this list. Petitioners argue that the judge erred in denying their motion to strike the testimony on the grounds that it was not based on the witness's personal knowledge or independent recollection. We disagree.

The testimony is clearly not admissible as a recorded recollection because the list was not prepared when the matter was fresh in the witness's memory. See Rule 803(5), N.C. Rules Evid. Testimony based on a written memorandum may also be admitted, however, when the witness uses the writing to refresh her memory. *State v. Smith*, 291 N.C. 505, 516, 231 S.E. 2d 663, 670 (1977). A writing used for such a purpose need not be prepared by the witness herself, and it may be used to refresh the memory of the witness prior to trial. *Id.* at 516-17, 231 S.E. 2d at

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671. The testimony should be excluded if it is clearly a mere recitation of the memorandum, but a ruling on a motion to strike the testimony on these grounds is a matter within the discretion of the trial judge. *Id.* at 518, 231 S.E. 2d at 671-72.

Since the clerk independently recalled that she had awarded attorney's fees for services performed by respondent and she used the prepared list only to specify what the services were, the judge, sitting without a jury, did not abuse his discretion by refusing to strike the testimony. Moreover, reasonableness of the fee not being at issue in this proceeding, the admission of the testimony could not have been prejudicial to petitioners.

[3] Petitioners next assign error to the judge's finding of fact that the clerk could allow commissions on the sum of \$956,754.32. Petitioners argue that this sum erroneously includes the amount of \$71,384.89 which was received from the sale of real property in the estate. The will directed respondent to sell the property and distribute the proceeds to the residuary beneficiaries.

Petitioners' argument is based on G.S. 28A-23-3(b), which provides in pertinent part:

Where real property is sold to pay debts or legacies, the commission shall be computed only on the proceeds actually applied in the payment of debts or legacies.

Petitioners contend that payment to residuary takers does not constitute payment of "legacies" and, therefore, respondent was not entitled to commissions on the proceeds.

We do not find it necessary to construe the term "legacy" in order to resolve the question before us in this case. The title to real property devised under a will vests in the devisees at the time of the testator's death. G.S. 28A-15-2(b). Land is not an asset of the estate until it is sold and the proceeds are received by the personal representative. *Linker v. Linker*, 213 N.C. 351, 354, 196 S.E. 329, 331 (1938). When land is sold to pay the debts of an estate, any surplus retains the status of real estate and remains vested in the devisees. *Id.*

Under G.S. 28A-23-3(a), a personal representative's commission is based on the receipts and expenditures of the estate. Under G.S. 28A-15-1(c), the personal representative may sell real

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estate "to obtain money for the payment of debts and other claims against the decedent's estate . . ." Thus, G.S. 28A-23-3(b) ensures that the personal representative's commission on such a sale is limited to the amount that was actually needed for the payment of claims. This discourages personal representatives from selling land merely to increase their commissions.

In the present case, respondent was required to sell the property under the terms of the will; thus the policy of G.S. 28A-23-3(b) is not involved. The property was not sold "to pay debts or legacies"; hence, subsection (b) does not apply, and the proceeds would be included in commissionable receipts under subsection (a) of G.S. 28A-23-3. Accordingly, the judge did not err in finding that commissions could be paid on the proceeds. We also note that, because the amount of the fee is not at issue, any error in this regard would not be grounds for reversal. Respondent's acceptance of commissions based on an erroneous interpretation of a statute would not be misconduct requiring revocation of Letters Testamentary.

[4] Petitioners next contend that the judge erred in making conclusions of law numbers 4 and 5 in which the judge concluded that the will "mandated" that respondent employ his own law firm and that respondent's actions did not constitute default or misconduct. Petitioners argue that, although the will directed respondent to employ his firm, such employment would only be justified if legal services were required, and such services were not required in this case.

We agree that the will provision alone does not justify the payment of attorney's fees. Such fees are payable only when services rendered are beyond the ordinary routine of administration and a representative who is not an attorney would be reasonably justified in retaining legal counsel. G.S. 28A-23-4. The judge did conclude, however, that respondent and his firm "rendered professional services as attorneys to the estate which were beyond the ordinary routine of estate administration." The gist of petitioners' argument is that respondent and his firm did not provide non-routine services so as to justify the payment of any attorney's fees.

We first note that petitioners' reliance on *Lightner v. Boone*, 221 N.C. 78, 19 S.E. 2d 144 (1942) is misplaced. That case was

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decided prior to the enactment of G.S. 28A-23-4, at which time an attorney who became an executor was not entitled to extra compensation for legal services rendered to the estate. *Lightner v. Boone*, 221 N.C. at 86, 19 S.E. 2d at 150. Petitioners also mistakenly rely on *In re Estate of Longest, supra*. In *Longest*, the revocation of Letters Testamentary was upheld where an executor paid himself fees and commissions without obtaining any approval from the clerk. *Longest*, 74 N.C. App. at 393-94, 328 S.E. 2d at 809. In the present case, the clerk testified that she approved the fees after conferring with respondent as to the amount of work involved in the administration of the estate. The clerk also testified that respondent did not request a dollar amount and that she advised him she would allow ten percent—five for commissions and five for legal fees. By approving a percentage, though not stated as a specific dollar amount, the clerk fixed the fee as required in *Longest*.

The steps in the settlement of an estate are described in G. Stephenson and N. Wiggins, Estates and Trusts Ch. 15, at 219 (5th ed. 1973), and include:

- (1) procedure prior to appointment of administrator or executor; (2) appointment of administrator or executor; (3) assembling property belonging to estate; (4) safekeeping or safeguarding that property; (5) interim management of that property; (6) assembling, passing upon, and paying debts, taxes, and expenses of settlement of estate; (7) accounting for settlement of estate; and (8) distributing net estate.

The need for legal services in executing one or more of these steps will vary from estate to estate depending upon the circumstances of each case. The nature of the assets, the number, age and location of heirs and beneficiaries, the care with which the decedent attended to his business affairs, and myriad other factors may affect whether legal services would be required by a nonattorney personal representative to complete administration of an estate. Likewise, the nature and extent of legal services required must be determined on a case-by-case basis. While certain lawyer services such as handling litigation, drawing legal documents, and rendering legal opinions based on legal research clearly are beyond the ambit of routine administration, other services such as preparing the ninety-day inventory, annual account, and

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final account are routine administration even when performed by a lawyer. Between these two extremes, there may be some services rendered by a lawyer personal representative which, in the context of a particular estate, constitute legitimate legal services beyond routine administration even though these tasks might be undertaken by a nonlawyer personal representative; for example: lease negotiations, conferences with Internal Revenue Service Agents, or negotiations to sell real or personal property. In this last category, the personal representative may not be required to have legal assistance, but prudence may dictate that to retain legal counsel would be reasonably justified. We shall not attempt to define all services which justify the payment of attorney's fees under G.S. 28A-23-4. The legislature undoubtedly took these varying circumstances into consideration when it vested the clerk of superior court with responsibility for evaluating the evidence produced by the attorney/executor and applying the prescribed two-pronged test to determine legal fees. G.S. 28A-23-3(a); G.S. 28A-23-4.

A petition to revoke Letters Testamentary is addressed to the discretion of the clerk, or, in this case, the judge. *See Jones v. Palmer*, 215 N.C. 696, 25 S.E. 2d 850 (1939). The denial of the petition, though reviewable, will not be reversed unless clear and compelling grounds for revocation are shown. *Id.* at 699, 25 S.E. 2d at 852. On the record before us, there is evidence that some services were provided by respondent and his firm which justify the payment of fees under G.S. 28A-23-4. There is also evidence that the clerk approved the fee. The clerk's approval of the fee is strong evidence that respondent's payment of the fee was not a breach of his duty. Whether the clerk applied the standard set forth in G.S. 28A-23-4 improperly and acted erroneously in approving a fee of five percent, as opposed to any fee, is not at issue in this proceeding as that question goes to the amount or reasonableness of the fee rather than to respondent's alleged misconduct. We do note, however, that the better procedure is for the attorney personal representative to submit his request for legal fees in writing supported by a statement detailing the specific legal services rendered and for the clerk to issue the order in writing stating the specific dollar amount approved.

[5] Petitioners next assign error to the court's conclusion of law "that the payment of commissions of \$89,000.00 being less than 10

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percent of the receipts and expenditures of the estate of Annie Mae S. Davis, it is not necessary in this proceeding to make a determination as to the reasonableness of said fee." Petitioners contend that this conclusion was "offered gratuitously by the court"; that it was made upon erroneous findings of fact premised on inadmissible parol testimony by the clerk of court; and that the conclusion is contrary to law. While we agree that the conclusion of law was superfluous in view of the parties' stipulation, we perceive no prejudicial error resulting from its inclusion. The key words are "in this proceeding." Read in light of the stipulation that the reasonableness or amount of the legal fee was not at issue and finding of fact number 20, that the clerk had told respondent she would allow commissions in the amount of ten percent of receipts and disbursements with five percent being attributable to executor's commission and five percent attributable to legal fees, the conclusion of law merely confirms that the amount paid was within the amount approved by the clerk, the reasonableness of which was not for consideration in this proceeding. We have already addressed petitioners' argument concerning parol evidence.

[6] Petitioners next argue that the clerk erred in basing the amount of attorney's fees on the size of the estate. The clerk testified that she allowed a fee of five percent of receipts and expenditures. The actual payment was slightly less than that amount. We agree with petitioners that fees awarded under G.S. 28A-23-4 should be for actual services rendered and should not be based solely upon the size of the estate. Nevertheless, the size of the estate provides a useful guideline and may be considered as a factor in determining whether legal services were necessary and the time expended justified.

[7] Petitioners' reliance on *In re Moore*, 292 N.C. 58, 231 S.E. 2d 849 (1977), to support this argument is again misplaced. In *Moore*, the legal fee being challenged was not for legal services rendered in administrating the estate, but rather for services to the person named as executor in the will in defending a challenge to his qualifying as personal representative. Our Supreme Court stated that, in that context, for the trial judge to consider the size and complexity of the estate was improper and the Court directed that the legal fee be based on services rendered. The legal services rendered in *Moore* had no relationship to the size and com-

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plexity of the estate. Because the amount of the fee is not being reviewed on this appeal, we find no reversible error in the award of a fee based on a percentage of the estate.

[8] Petitioners finally assign error to the signing and entry of the order as being contrary to law. This argument is premised on the theory that respondent obtained no approval for payment of legal fees and that this case is controlled by *In re Estate of Longest*, 74 N.C. App. 386, 328 S.E. 2d 804. *Longest* is distinguishable, however, for the reason that in *Longest* the clerk sent the executor repeated notices to file a petition for approval of the fees he was drawing from the estate. The executor ignored these notices but continued to pay himself fees. The line of cases interpreting G.S. 28A-9-1 is clear that the clerk must remove a personal representative when the clerk finds "the omission of duty is sufficiently grave to materially injure or endanger the estate, or if compliance with the orders of the court in the supervision and correction of the administration are not promptly obeyed." *Jones v. Palmer*, 215 N.C. at 699, 25 S.E. 2d at 852. The clerk in this case testified she approved commissions equal to ten percent—five percent for attorney's fees. The credibility of the testimony is for the trier of fact to decide. *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E. 2d 29, 33 (1968).

Based on the foregoing, we affirm the judge's order denying the petition to revoke respondent's Letters Testamentary. In so doing, we emphasize that we are not expressing approval of the manner in which either respondent or the clerk handled the legal fee in this estate. Our decision is limited solely to the issue of the revocation of respondent's Letters Testamentary. Neither our decision nor the order of the judge below will preclude petitioners from challenging the amount of the fee or seeking damages in a separate proceeding. See *Shelton v. Fairley*, 72 N.C. App. 1, 6-7, 323 S.E. 2d 410, 415 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E. 2d 394 (1985).

Affirmed.

Judge WELLS concurs and files a concurring opinion.

Judge ORR dissents.

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Judge WELLS concurring.

The dissent in this case emphasizes that the approval by Clerk Nelms of attorney's fees to respondent's law firm lacked the "specificity" required by G.S. § 28A-23-4. The issue of "specificity" was stipulated by the parties to be the subject of a separate proceeding and was not attempted to be settled in this case. The question as to attorney's fees presented in this case was not how much was proper, but whether *any* attorney's fee was properly allowed. It being undisputed that Clerk Nelms exercised her judgment to allow an attorney's fee, Judge Hobgood properly resolved *that issue* in favor of respondent.

Judge ORR dissenting.

The majority fails, in my opinion, to correctly address a substantial issue raised by the petitioners and ruled upon by the trial court. In the petition it is alleged that the payment of attorney's fees by the executor was "wrongful and in violation of the provisions of N.C. Gen. Stat. § 28A-23-4" That statute says:

The clerk of superior court, in his discretion, is authorized and empowered to allow counsel fees to an attorney serving as a personal representative, collector or public administrator (in addition to the commissions allowed him as such representative, collector or public administrator) where such attorney in behalf of the estate he represents renders professional services, as an attorney, which are beyond the ordinary routine of administration and of a type which would reasonably justify the retention of legal counsel by any such representative, collector or public administrator not himself licensed to practice law.

N.C.G.S. § 28A-23-4 (1984).

The majority's interpretation of a stipulation by the parties that the amount or reasonableness of the legal fee was not at issue in this proceeding is, in my opinion, incorrect. As noted by the majority, the record also reflects that the parties agreed that the proceeding raised the issue as to whether the executor was entitled to any fee and illegally took it by virtue of the failure to comply with N.C.G.S. § 28A-23-4. Therefore, I view the resolution

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of the issue of compliance with N.C.G.S. § 28A-23-4 as being necessary to decide this case. For the reasons set forth below, I dissent on the grounds that the trial court erred in its ruling on this issue and should be reversed.

I.

An executor is a fiduciary to the beneficiaries of an estate. *Fortune v. First Union Nat. Bank*, 87 N.C. App. 1, 359 S.E. 2d 801 (1987); N.C.G.S. § 32-2(a) (1984). As such, an executor must act in good faith and may never paramount his own personal interest over the interest of those for whom he has chosen to act. *Miller v. McLean*, 252 N.C. 171, 113 S.E. 2d 359 (1960); *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E. 2d 113 (1971).

"Both by law and the words of his oath [an executor] must faithfully execute the trust imposed in him. He must be impartial. He cannot use his office for his personal benefit." *In re Moore*, 25 N.C. App. 36, 40, 212 S.E. 2d 184, 187, *cert. denied*, 287 N.C. 259, 214 S.E. 2d 430 (1975), quoting, *In re Will of Covington*, 252 N.C. 551, 553, 114 S.E. 2d 261, 263 (1960); N.C.G.S. § 11-11 (1986).

In the present case, petitioners argue respondent engaged in self-dealing and, thus, breached his fiduciary duty as executor by paying estate monies to a law firm of which he was a principal for unnecessary and nonexistent legal services.

It is well established that when an executor also serves as an attorney to an estate, and is paid separately for the two services, a potential risk of self-dealing arises. Annot. "Personal Representative—Compensation," 65 A.L.R. 2d 809 (1959). The risk inherent in this situation is that the executor will deplete the assets of the estate through payments to himself for unnecessary work or for excessive legal fees. *Id.* Payments to a law firm, of which an executor is a principal, are viewed the same as payments made directly to the executor acting as the estate's attorney, because in either situation the executor will receive compensation beyond that received for his duties as executor. Annot. "Personal Representative—Compensation," 65 A.L.R. 2d 809 § 6 (1959); 33 C.J.S. *Executors and Administrators* § 223(2) (1942).

In North Carolina the potential for self-dealing, when an executor serves as estate attorney, was recognized in *Lightner v. Boone*, 221 N.C. 78, 19 S.E. 2d 144 (1942), which says:

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When a lawyer voluntarily becomes executor he takes the office *cum onere*, and although he exercises his professional skill in conducting the estate he does not thereby entitle himself to compensation beyond the amount ordinarily allowed to an executor or an administrator. . . .

'In the absence of statute, the general rule is that where a lawyer becomes executor or administrator, his compensation as such is in full for his services, although he exercises his professional skill therein; and even if he performs duties which he might properly have hired an attorney to perform, he is not entitled to attorneys' fees.' . . . The rule is one of public policy, grounded upon the principle that a trustee shall not place himself in a situation where his interests conflict with his duties as fiduciary. . . . It has been said that if an executor chooses to exercise his professional skill as a lawyer in the business of the estate, it must be considered a gratuity, and that to allow him to become his own client and charge for professional services would be holding out inducements for professional men to seek such representative places to increase their professional business which would lead to most pernicious results.

221 N.C. at 86, 19 S.E. 2d at 150 (citations omitted).

The North Carolina legislature in 1957 enacted the predecessor to the current N.C.G.S. § 28A-23-4, and altered the law on this question by allowing attorney executors to also pay themselves legal fees under certain circumstances. As noted before, the statute provides that the payment of attorney's fees must be authorized by the clerk of superior court, sitting as probate judge. Second, before the clerk may order fees paid, he must find: (1) that the executor rendered professional legal services to the estate, (2) that these legal services were beyond ordinary routine estate administration, and (3) that a non-attorney executor would be reasonably justified in retaining an attorney to perform the same services for the estate. If a clerk fails to find all of the requirements stated above, he would not be authorized under N.C.G.S. § 28A-23-4 to allow the payment of attorney's fees to an executor-attorney.

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II.

On appeal petitioners argue that the evidence before Granville Superior Court Clerk Mary Ruth Nelms failed to establish the N.C.G.S. § 28A-23-4 factors. Accordingly, petitioners contend that there was insufficient evidence for the trial court's findings of fact and conclusions of law. These findings and conclusions hold that Clerk Nelms properly authorized the payment of attorney's fees to respondent's law firm and that respondent did not breach his fiduciary duty by requesting and paying these fees.

In reviewing this argument, a close examination of the testimony must be considered.

A.

Clerk Nelms oversaw probate of the Davis estate and verified the final estate accounting, which included the payments to respondent's law firm. She testified that during the estate administration she met periodically with respondent to discuss his actions, and she regularly telephoned respondent and his secretary concerning the estate.

Regarding respondent's petition for attorney's fees, Clerk Nelms testified that in November or December of 1985 she and respondent discussed the work he had performed during the estate administration and the commissions to be paid by the estate for his work.

Clerk Nelms described the discussion as follows:

Well, on that particular day the best I can recall I know that Mr. Watkins and Mrs. Bernard came into my office, and Mr. Watkins said that he wanted to talk to me about the attorneys, the commissions, in the estate because it would soon be time to file the Federal tax returns and they needed to be thinking about what they had to do;

And so we discussed the estate just like we had from the very beginning, because even the day we qualified we discussed the, how large the estate was, and what a tremendous amount of work was involved in the administration of it;

And we went over what had, some of the things that had been done and the things that were needed to be done;

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And so I have made a little list of the different things that I knew that we tried to talk about. Of course, since '85 it's hard for me to remember everything that we discussed, Your Honor.

They had to file the income tax returns for the deceased for her last year.

. . .

They had to file the Social Security and FICA returns due by the deceased. They had to negotiate, negotiations with the tenants for possession of the house and the restoration;

Collection of appraisal and security of personal property. They had to file the 90-day inventory. Private family auction of personal property.

Negotiations and sale of residence for net price above the appraised value;

Preparation and filing of the Federal tax return. This is the death return.

Preparation and filing of the estate inheritance tax return; the fiduciary tax returns;

Tax waivers. I had to get the tax waivers for the sale of the securities.

Communication with devisees regarding stock sales;

Sales of securities;

Liquidation of Mr. Luther Davis' trust account.

Negotiations and settlement of disputed certificates of deposit. There was a dispute there on certificates of deposit that they had to be resolved because of what had been the way it was stated on the certificate of deposit and the bank records which caused the tax returns to have, as I understand, to be filed twice;

And then I recall that he told me it was just hundreds and hundreds of hours that had been spent professionally in the estate;

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And there were other things that had to be done, but I don't recall any of the rest of them at this time.

It's in, you know, anything in a regular routine of an estate.

When asked, "Is there any item on that list . . . that can only be rendered by a licensed attorney at law as opposed to a layman? Please answer yes or no," Clerk Nelms responded,

No. I would like to explain. . . . I would say that eighty per cent, approximately, of all the people that I deal with do not know how to deal with an estate.

The ones that tried have a hard time. They go out and they try to get a lot of people to help them with it, and then they have to end up going and getting someone.

In my opinion a layman could not have administered this estate, and he would have been required to have gotten an attorney to help him.

Next, Clerk Nelms was asked,

All right. And is that why you testified in response to Mr. Clark's question that you were going to let Mr. Watkins draw a double fee, one for being the Executor and one for being the lawyer?

Is that why you said you had agreed to that? To which she answered,

Yes, sir, because I—you see most people have a lawyer anyway, so they're entitled to a—a layman just would be entitled to five per cent on receipts and disbursements. . . . And then they would have had to have paid an attorney.

Then Clerk Nelms was questioned,

So in this case since Mr. Watkins didn't have to go out and hire an attorney, you decided to just let him double up because it would be the same difference anyway on somebody else?

In response Clerk Nelms said,

After discussing this with Mr. Watkins at length and going over what had to be done in this estate, all the little

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things that had to be done in the estate that are not even listed, I could not even remember to tell you the things that he told me had to be done in this estate, I thought that he was entitled to what I stated this morning.

Finally, regarding the percentage and amount of commissions awarded to respondent, Clerk Nelms testified,

Well, we talked about it, and Mr. Watkins never asked for a percentage and he never asked for an amount in dollars.

We didn't never discuss what the amount in dollars would be.

And after we had gone all over all of this and knew what else had to be done in the estate, I told Mr. Watkins that I would allow him five per cent on the, on receipts and disbursements as Executor, and five per cent on receipts and disbursements on attorney's fees.

Respondent thereupon paid \$89,000 to his law firm both for his commission as executor and for his and his law firm's commissions as estate attorneys.

Clerk Nelms, when questioned about legal services rendered to the Davis estate by respondent's law firm, Watkins, Finch & Hopper, said that she knew the law firm had prepared a deed for the estate. Clerk Nelms further testified that although she didn't have personal knowledge of any other legal service provided by the firm to the estate, "I do know that the attorneys, Mr. Watkins' partners, they knew what was going on at all times in the estate; [and] I feel that they rendered a valuable service to Mr. Watkins and to the heirs and to everyone concerned."

Clerk Nelms acknowledged that neither of respondent's petitions seeking commissions specifically requested payment for legal services. She also admitted she authorized respondent to pay his commissions before he had filed a final accounting of estate finances, and before she had fixed a dollar amount for the attorney's fees.

Finally, Clerk Nelms said she had never entered into the estate file written findings of fact explaining her decision to award respondent a commission for legal services. Nor had she

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ever written into the estate file either the dollar amount or the percentage allowance she had fixed for attorney's fees.

B.

At the hearing, respondent also testified as to the basis for his petition seeking attorney's fees. In answer to the question, "[W]hat legal services have you rendered to the estate of Annie Mae S. Davis as an attorney . . . [w]hich are beyond the ordinary routine of administering most estates?", respondent said:

To begin with after this petition was filed I asked my law partner, Mr. Hopper, to take that, the two big files that you see down there that are part of the papers that resulting from the administration of the, this estate, and to go through them one by one and determine in his mind conservatively, extremely conservatively, as to how many hours would have to be spent performing that service as an attorney.

. . .

And he estimated from going through the papers that we performed six hundred and eighty-three hours of legal service to this estate.

When asked to describe these legal services, respondent answered as follows:

All right. Mr. Parker, the routine services of an administrator in Granville County in the thirty-five years that I've been practicing estate law; . . .

From virtually what they do in the beginning, a routine executor, I mean administrator or executor, comes into your office and says, we have my father, my mother, my relative died, I want you to tell me what I've got to do;

And I immediately explain how you administer an estate. One out of a hundred will not even know that you've got to carry the Will to the Courthouse to have it recorded.

. . .

They do not even know that you have to fill out an application for Letters Testamentary or Letters of Administration and qualify before the Clerk;

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And at that time you've go to know the assets of the estate, you have to advise them on all of that.

Now, because I had that knowledge over and above that of an ordinary person who would have come in to handle this estate does not mean that I don't get compensated for it.

...

And that's part of an attorney's duty; and that's what we had to do in this that's not normal routine duties of an administrator.

...

And we did that and got the application ready and went up to qualify.

Now, to say all of that was duties of an administrator or an executor is absolutely routine duties is absolutely erroneous.

...

I'm telling you what I performed. I performed those services.

When asked, "Weren't all of those things part of the ordinary routine administration of an estate?", respondent explained,

No, sir. Not by the administrator, not by the executor, it's not routine things performed by the ninety-nine per cent of the executors and administrators of an estate.

...

You asked me what legal duties I performed.

I performed all legal duties that were not routine duties of an executor or administrator; and I'm enumerating what are not routine duties of an administrator or an executor.

Responding to the question, "What did you do in those six hundred and eighty-three hours' worth of services which were beyond the ordinary routine of estate administration and which involved your services as an attorney?", respondent testified:

All right, sir. Now, Mr. Parker, you know and I know and everybody else with any reasonable amount of intelli-

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gence knows that I cannot sit here on this witness stand without any reference whatsoever and tell you everything I did as an attorney.

I can do it better by comparison than anything else.

...

The only—when you do not intend to charge by the hour but you intend to charge for the responsibility that you're subjected to, and some of that responsibility is being paid for just where I'm sitting today.

Every time I serve as an attorney for an estate I'm subjected to the possibility that someone will not think that I, that I did as much work, who do not know what I do, and will want to question me and bring me before the Court and allege embarrassing things about me, that's part of what I get paid for as an attorney;

And I think you have to be compensated well for such things to occur to you;

And that's part of what—and I haven't even included that in the six hundred and eighty-three hours of legal services, and that's as much a part of a legal service as anything else you do.

Respondent further told the court at the hearing that the above testimony, concerning his petition for attorney's fees, was evidence sufficient to satisfy the requirements of N.C.G.S. § 28A-23-4.

C.

Respondent's two law partners, William Hopper and Dennis Finch, also discussed the legal services they each had provided to the estate.

Mr. Hopper said he had been consulted by respondent on the following issues of estate administration: (1) the eviction of a tenant; (2) the transfer of stock; (3) the release of trust funds; (4) the appraisal, sale and distribution of personality; and (5) the sale of real property. Mr. Hopper testified that he had kept no record of the time involved in these consultations, and that he had no opinion as to the value of his services.

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In addition, Mr. Finch said he had been consulted by respondent concerning the estate once on the issue of survivorship rights to an estate certificate of deposit and several times in general conversations. Mr. Finch estimated that he had spent less than eight hours working on the survivorship rights issue, and he further said he was unable to recall the amount of time he had spent with the other consultations.

D.

Based on the testimony discussed above, Judge Hobgood made findings of fact, including the following:

In October or November of 1985, Mary Ruth C. Nelms had a conference in her office with William T. Watkins concerning commissions and fees. William T. Watkins told Mrs. Nelms that he wanted to talk about commissions because it would soon be time to file Federal estate tax returns and State inheritance tax returns. Mr. Watkins never suggested or asked for any specific amount in terms of percentage or dollars. Mrs. Nelms knew at that time the various work, time and attention this estate had required of William T. Watkins and the law firm of Watkins, Finch and Hopper. Mrs. Nelms testified at this hearing that William T. Watkins had worked on this estate hundreds and hundreds of hours. Mrs. Nelms told William T. Watkins at that conference in October or November of 1985, that she would allow him a five per cent commission as Executor and that she would allow a five per cent commission as attorney fees.

That since October or November, 1985, it has been the intent of Mary Ruth C. Nelms, Granville County Clerk of Superior Court, that she would allow total commissions to William T. Watkins and the law firm of Watkins, Finch and Hopper in the amount of 10 per cent of receipts and expenditures, which constituted five per cent of receipts and expenditures as Executor's commission and five per cent of receipts and expenditures for professional services as an attorney beyond the ordinary routine of estate administration. Mrs. Nelms told William T. Watkins of this intent in October or November of 1985.

Judge Hobgood then concluded as a matter of law:

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1. Mary Ruth C. Nelms, Granville County Clerk of Superior Court, by her verbal instructions to William T. Watkins in October or November of 1985, by her written orders of December 11, 1985, and September 16, 1986, and by her approval of the annual account which was filed June 17, 1987, has approved a total payment of commissions to William T. Watkins and the law firm of Watkins, Finch and Hopper from this estate in the amount of \$89,000.00 in accordance with North Carolina General Statutes Section 28A-23-3 and Section 28A-23-4.

2. The petitioners, the residuary heirs under the will, having failed to show that the Granville County Clerk of Superior Court did not approve the payment of commissions to William T. Watkins and the law firm of Watkins, Finch and Hopper cannot prevail on the contention that said total payments were wrongful and in violation of North Carolina General Statutes Section 28A-23-4.

3. That there is evidence to support the payment of commissions pursuant to North Carolina General Statutes Section 28A-23-4, in that William T. Watkins and the law firm of Watkins, Finch and Hopper rendered professional services as attorneys to the estate which were beyond the ordinary routine of estate administration.

...
5. That the actions of William T. Watkins as Executor do not constitute default or misconduct in an individual capacity or in a fiduciary capacity.

III.

In examining the case before us, the fundamental distinction between a non-attorney executor and an attorney executor is critical. Clearly, a non-attorney executor, subject to normal fiduciary responsibilities, can hire an attorney to handle all or part of the duties associated with the routine administration of an estate and pay legal fees so incurred while still receiving compensation for his duties as executor.

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An attorney executor may draw his full commission like any other non-attorney executor, for serving as executor, but in order to receive legal fees in addition to that, he must meet the test set forth in N.C.G.S. § 28A-23-4.

To meet the first part of the test, then, an attorney executor must specifically show to the clerk that the services rendered to the estate as an attorney were beyond the ordinary routine of administration. Secondly, the attorney executor must specifically show that a non-attorney executor would have been reasonably justified in retaining counsel to handle the specific work.

Only when this two-pronged statutory test has been met, may the clerk of court approve the payment of legal fees to an attorney executor. We must now consider the evidence in the record as previously set out to see if this test was met.

Clerk Nelms' testimony failed to identify what specific types of legal services were provided to the estate; why these services were beyond ordinary routine estate administration; who performed these services; and why the services required the assistance of a licensed attorney.

In addition, Clerk Nelms' testimony was unsubstantiated by any written documentation from or by respondent, a fundamental requirement when requesting legal fees be approved by a court official. The Davis estate file maintained by Clerk Nelms contained no information specifying what legal services were performed on behalf of the estate that would justify a finding of the N.C.G.S. § 28A-23-4 factors and entitle respondent and his law firm to attorney's fees.

Furthermore, the testimony of respondent was inadequate to meet the test set out in N.C.G.S. § 28A-23-4. Respondent's testimony, like that of Clerk Nelms, was general in scope, lacking the specificity necessary to determine the exact legal services he had performed and failing to explain why the legal services exceeded routine estate administration. Neither did respondent produce records, documenting the nature of the legal services rendered and the time required to perform those services to Clerk Nelms with his petition.

It would appear from respondent's testimony that in his opinion the estate was complex and not one that could be handled by

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a non-lawyer, thus justifying the use of legal services. Such may well be the case if the executor in the case *sub judice* had been a non-attorney.

However, as noted previously, the standard is different, and appropriately more stringent, for an attorney who also is serving as executor and being compensated for his duties in that position. As respondent's testimony shows, the evidence he presented to Clerk Nelms and to Judge Hobgood lacked the specificity necessary to establish a basis for his petition seeking attorney's fees. Likewise, the testimony of Mr. Hopper and Mr. Finch also was insufficient to support respondent's petition for attorney's fees. While their combined testimony indicated they had each performed minor legal services for the estate, this testimony failed to address the standards set out above and for entitlement to legal fees.

IV.

Therefore, I conclude that based on the evidence produced at the hearing below the clerk was not authorized to approve the payment of counsel fees to respondent's law firm, since the requirements of N.C.G.S. § 28A-23-4 were not met. Therefore, respondent's payment of fees to his law firm was unauthorized. To that end, in my opinion, the trial court committed reversible error and this matter should be remanded.

IN RE: ERICA RENEE WILLIAMSON (A MINOR CHILD) BORN: FEBRUARY 3, 1981

ARTHUR CLARK AND MELISSA CLARK, PETITIONERS v. CHARLES FRED WILLIAMSON, RESPONDENT

No. 8826DC160

(Filed 1 November 1988)

1. Parent and Child § 1.6— termination of parental rights—finding of neglect not negated by evidence

Evidence in a proceeding to terminate parental rights that respondent, in correspondence with his sister, inquired about the child and stated that he loved her did not necessarily negate the court's finding that the child had been neglected.

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2. Parent and Child § 1.6— termination of parental rights—conclusion of lack of parental concern

The trial court in a proceeding to terminate parental rights did not err in concluding that respondent "acted in such a way as to evince a lack of parental concern for the child" since such language was simply an alternate way of stating that respondent has failed to exercise proper care, supervision and discipline of the child within the meaning of N.C.G.S. § 7A-517(21).

3. Parent and Child § 1.6— termination of parental rights—neglect of child—sufficiency of findings

The trial court's conclusion in a proceeding to terminate parental rights that respondent "acted in such a way as to evince a lack of parental concern for the child" and thus neglected the child within the meaning of N.C.G.S. §§ 7A-289.32(2) and 7A-517(21) was supported by findings that respondent had little if any contact with the child in the year preceding his murder of the child's mother; respondent has been incarcerated since the murder; respondent has twice given his consent for the child's adoption by his sister and her husband; and respondent has known for some five years that the child was in petitioners' custody but has made no effort to contact petitioners, to send support for the child to petitioners, or to establish any verbal or written communication with the child.

4. Parent and Child § 1.5— termination of parental rights—prior finding that child "dependent"—finding of neglect not precluded

The trial court in a proceeding to terminate parental rights was not precluded from adjudicating that the child was "neglected" pursuant to N.C.G.S. §§ 7A-289.32(2) and 7A-517(21) because of earlier district court orders concluding that the child was "dependent" as defined in N.C.G.S. § 7A-517(13).

5. Parent and Child § 1.6— termination of parental rights—neglected child—murder of child's mother and incarceration not sole factor

The trial court did not improperly rely solely on respondent's murder of his child's mother and his subsequent incarceration in determining that the child was "neglected" where the record shows that the court also considered respondent's actions and other circumstances since the murder in concluding that respondent neglected and abandoned his child.

6. Parent and Child § 1.6— termination of parental rights—neglect—finding of failure to pay costs immaterial

Where the trial court's order terminating parental rights was supported by a valid determination that the child was neglected, the court's reference to the statute relating to the failure to pay a reasonable portion of the child's care costs, N.C.G.S. § 7A-289.32(4), was immaterial.

7. Parent and Child § 1.6— termination of parental rights—plan to adopt finding unnecessary

The trial court's finding in an order terminating parental rights that petitioners plan to adopt the child was unnecessary because petitioners met other criteria for instituting a proceeding to terminate respondent's parental rights; furthermore, there was sufficient evidence in the record to support such finding.

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8. Parent and Child § 1.6 – termination of parental rights – statement of standard of proof

The trial court complied with N.C.G.S. §§ 7A-635 and 7A-637 in an order terminating parental rights by stating that neglect of the child had been shown by "clear and convincing evidence," and the court was not also required to recite that its dispositional finding that the best interest of the child required termination of respondent's parental rights was discretionary.

9. Attorneys at Law § 7.5; Rules of Civil Procedure § 11 – attorney fees – Rule 11 amendment inapplicable

The trial court could not award attorney fees pursuant to N.C.G.S. § 1A-1, Rule 11 where the amendment allowing such an award was not effective until after the filing of the claim for declaratory relief on which the award was based.

10. Attorneys at Law § 7.5 – attorney fees – absence of justiciable issue

The trial court could properly award attorney fees to respondent under N.C.G.S. § 6-21.5 after petitioners voluntarily dismissed their claim for a declaratory judgment that respondent was not the biological father of a certain child where the claim was based on allegations that respondent and the child's mother were married only a few weeks prior to the birth of the child and that the child bears no physical resemblance to respondent, and where the record supported the trial court's finding that there was a complete absence of a justiciable issue of law or fact concerning respondent's paternity of the child.

11. Attorneys at Law § 7.5 – absence of justiciable issue – amount of attorney fees

Where counsel appointed to represent respondent in a proceeding to terminate his parental rights also represented him in a related frivolous action by petitioners for a declaratory judgment as to paternity, the trial court erred in limiting the amount of attorney fees awarded to respondent in the paternity action under N.C.G.S. § 6-21.5 to the court-appointed rate of \$35.00 per hour.

APPEAL by respondent and by petitioners from *Matus /T. Patrick, II*, Judge. Orders entered 22 September 1987 in District Court, MECKLENBURG County. Heard in the Court of Appeals 30 August 1988.

This is an appeal from an order terminating the parental rights of respondent as to his child Erica Renee Williamson (hereinafter Erica) and from an order for payment by petitioners of respondent's counsel fees in a related paternity action. The facts surrounding this appeal have been recited by this Court in a number of cases, including an appeal from Erica's initial custody decree, *In re Williamson*, 67 N.C. App. 184, 312 S.E. 2d 239 (1984); an appeal from an order modifying Erica's custody and guardianship, *In re Williamson*, 77 N.C. App. 53, 334 S.E. 2d 428 (1985), *disc. rev. denied*, 316 N.C. 194, 341 S.E. 2d 584 (1986); and an ap-

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peal from respondent's criminal conviction for the murder of Erica's mother, *State v. Williamson*, 72 N.C. App. 657, 326 S.E. 2d 37 (1985).

The facts relevant to this appeal may be briefly outlined as follows. Respondent and Erica's mother, Joan Brown Williamson, were married in January of 1981, approximately one month before Erica's birth. The couple lived together for a number of months, then separated. The record contains evidence that respondent had a history of alcohol and drug abuse, and during the period after his separation from Erica's mother, he participated in two treatment programs, one in North Carolina and one in Texas. During this time, respondent had little or no contact with Erica. In 1982, respondent returned to North Carolina and sought visitation rights with Erica. On 30 April 1982, immediately following a hearing to determine his visitation rights, respondent shot and killed Erica's mother near the Columbus County Courthouse. Respondent pleaded guilty to second degree murder and is currently serving an active sentence in the North Carolina Department of Correction.

On 30 April 1982, Erica was made a ward of the juvenile court, and in May 1982, when Erica was sixteen months old, she was adjudicated a dependent child and placed in the temporary custody of the Columbus County Department of Social Services. Several placements were considered for Erica, including one with respondent's sister and her husband, and one with the first cousin of Erica's mother and her husband, petitioners in the case now before us. Erica was ultimately placed with petitioners.

On 23 October 1986, petitioners commenced this action by filing a verified complaint seeking a declaratory judgment that respondent is not the biological father of Erica; alternatively, petitioners filed a petition seeking termination of respondent's parental rights as to Erica based on abuse, neglect, and abandonment. On 24 April 1987, petitioners took a voluntary dismissal of the declaratory judgment action. After trial without a jury on the remaining matter, the trial judge made findings of fact and conclusions of law and granted petitioners' petition for termination of respondent's parental rights as to Erica. To this order, respondent appeals. In a separate order, the trial judge ordered petitioners to pay counsel fees incurred by respondent in defending

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against the declaratory judgment action concerning Erica's paternity. To this order, both parties appeal.

George Daly for petitioner-appellees and cross-appellants.

Joyce M. Brooks and John O. Pollard for respondent-appellant and cross-appellee.

Donald S. Gillespie, Jr., as Guardian ad Litem for Erica Renee Williamson, a minor child, appellee.

PARKER, Judge.

In this appeal, respondent contends, in essence, that the trial court's conclusions of law—(i) that grounds exist to terminate respondent's parental rights as to Erica pursuant to G.S. 7A-289.32 and (ii) that it is in Erica's best interests that respondent's parental rights be terminated pursuant to G.S. 7A-289.31—are not supported by appropriate findings of fact or sufficient evidence. Respondent also contends that the trial court erred in limiting the amount of attorney's fees awarded for defense of the declaratory judgment action as to the paternity of Erica to \$35.00 per hour. Petitioners argue in their cross-appeal that the trial court erred in awarding respondent attorney's fees in the paternity action. We shall address the issues involving the termination of parental rights first.

I.

Order Terminating Parental Rights

In his brief, respondent first argues that he has not shown "a settled purpose to relinquish all parental claims" as to Erica in that while he has been incarcerated he has "repeatedly inquired about and requested visitation with his child." In his argument, respondent contends that the trial court erred in making the following conclusions of law:

4. In all matters for termination of parental rights, the burden of proof is always with the petitioner(s) to prove by clear and convincing evidence the existence of one or more circumstances which warrant termination (under G.S. 7A-289.32). In this case, the petitioners have proved the existence of "neglect" and "abandonment," which are statutory grounds for termination, G.S. 7A-289.32(2) and (4) respective-

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ly. The Court reaches the conclusions of law that these two grounds have been established by clear and convincing evidence.

5. Respondent murdered the mother (who was the caretaker and custodian of the child) and this placed the child in the status of a "neglected" child who required custody and care of Social Services. By the murder and following the murder, the father has acted in such a way as to evince a lack of parental concern for the child. He has totally withheld his love, affection, support and supervision from his child, in such a way as to show a settled purpose to forego all parental duties and relinquish all parental claims. Respondent has twice consented to adoption of his child by his sister, the last time being as recent as November or December 1986. In short, respondent has totally abandoned his child. His profession of "love" in letters to his sister and in this case in court does not dissipate the abandonment.

In a proceeding to terminate parental rights pursuant to G.S. Chap. 7A, Article 24B, the trial judge must find facts based on the evidence and make conclusions of law which resolve the ultimate issue whether neglect authorizing termination of parental rights is present at that time. *In re Ballard*, 311 N.C. 708, 716, 319 S.E. 2d 227, 232 (1984). Petitioners who seek termination have the burden of showing by clear, cogent, and convincing evidence that such neglect exists at the time of the termination proceeding. G.S. 7A-289.30(e). *Id.*

In the instant case, the trial court found as fact that for at least a year prior to the murder of Erica's mother and respondent's subsequent incarceration, "respondent had little if any contact with his minor child, who was residing with her mother"; that respondent has twice signed his consent for Erica's adoption by his sister and her husband; that since his incarceration, respondent has not seen Erica; that although respondent has known since September 1982 that Erica was in petitioners' custody, he has made no attempt to communicate with petitioners or to send any support or maintenance to petitioners for the benefit of the child; that although respondent has had limited resources while in prison, he has had sufficient funds available for corresponding with Erica or for acknowledging her birthday or other

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special occasions; and that since September 1982, respondent has not had any verbal or written communication with Erica.

[1] Respondent does not attack the evidentiary bases for the court's findings, but rather respondent points to evidence in the record that would support different findings and would tend to lead to the conclusion that there are no grounds for termination of his parental rights. After careful review of the record in this case, we conclude that the trial court's findings of fact are supported by clear, cogent, and convincing evidence. When the court's findings of neglect are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary. *In re Montgomery*, 311 N.C. 101, 112-13, 316 S.E. 2d 246, 252-53 (1984). Moreover, while the evidence also shows that respondent frequently inquired about Erica and stated that he loved Erica in his correspondence with his sister, this evidence does not necessarily negate the court's finding that the child has been neglected. "[T]he fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected." *Id.* at 109, 316 S.E. 2d at 252.

[2] In his second argument, respondent contends that the trial court erred in concluding that respondent "acted in such a way as to evince a lack of parental concern for the child." Respondent argues, first, that "lack of parental concern" is not a proper ground for termination of parental rights under G.S. 7A-289.32 and, second, that the only finding of fact to support this conclusion is finding number twenty-three, that respondent "could have expressed his parental love and concern in more meaningful ways," a finding that is not supported by the evidence. We disagree with these contentions.

General Statute 7A-289.32 enumerates the alternative grounds for termination of parental rights. Among these grounds are that the parent abused or neglected the child, G.S. 7A-289.32(2), and that the parent willfully abandoned the child for at least six months immediately prior to the filing of the petition for termination, G.S. 7A-289.32(8). The term "neglected juvenile" is defined, in part, in G.S. 7A-517(21) as "[a] juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned

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. . . ." An individual's "lack of parental concern for his child" is simply an alternate way of stating that the individual has failed to exercise proper care, supervision, and discipline as to that child. Furthermore, abandonment is the willful neglect or refusal to provide parental care and support including the withholding of love and affection as well as financial support and maintenance. See *In re APA*, 59 N.C. App. 322, 296 S.E. 2d 811 (1982). Respondent's objections to the court's language in conclusion of law number five are totally without merit.

As to the second portion of respondent's argument, we first note that respondent's brief takes out of context and misquotes a portion of finding of fact number twenty-three. Finding of fact number twenty-three, in its entirety, states the following:

23. From his employment in the prison system the respondent earns presently one dollar per day and has been earning that sum for several months. Prior to this he made 40 cents per day for a period of eight to ten months and thereafter 70 cents per day. These sums have been paid to him weekly and have been used by him to purchase hygiene items such as toothpaste with the balance of his funds having been used to purchase drinks and snacks. The respondent also occasionally received sums of money from his sister. While recognizing that his funds have been limited, it is also clear that his expenses have been limited and there were in fact sufficient funds available for the respondent to use for the purpose of corresponding with his daughter or in acknowledging her birthdays or other special events. While such efforts by the respondent may have been difficult under the facts of this case they certainly would not have been impossible and would have resulted in more meaningful evidence of the respondent's interest in his daughter than his verbal assertions on the witness stand and his indirect inquiries and statements about his daughter made to his sister, Mrs. Britt in the numerous correspondences and conversations with Mrs. Britt.

There is sufficient clear, cogent, and convincing evidence in the record to support this finding. Respondent, however, contends that he could not correspond with Erica or acknowledge her birthday or other special occasions because he did not have her ad-

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dress and because he had no "access to shopping facilities to make purchases suitable for a young child." Respondent further argues that any such attempt to correspond with Erica would have been futile because petitioners would oppose and prevent any such contact. These arguments are meritless.

There is ample evidence in the record that respondent knew of Erica's presence at petitioners' home as early as September 1982 and that he knew of the continuing contact of his attorney and his sister's attorney with petitioners and petitioners' attorney in the ongoing custody proceedings involving Erica. Moreover, the record contains more than eighty pages of respondent's letters to his sister and her family, providing abundant evidence that respondent could and did write letters and send cards to other family members. Finally, respondent clearly had the means to acknowledge Erica's birthday with a purchase "suitable for a young child," for, as the trial court points out in finding of fact number twenty-five, "Respondent sent one birthday card to the child but that was in the summer of 1983 and it was not to the child but to his sister." The court further notes, "The child's birthdate is in February."

[3] Finally, the trial court's finding of fact number twenty-three is not the only finding to support the conclusion that respondent "acted in such a way as to evince a lack of parental concern for the child." As noted above, the court found, among other findings, that respondent had little if any contact with Erica in the year preceding the murder of Erica's mother; that since the murder, respondent has been incarcerated; that respondent has twice given his consent for the child's adoption by his sister and her husband; that respondent has known that Erica was in petitioners' custody since September 1982; and that since September 1982, respondent has made no effort to contact petitioners, to send support for Erica to petitioners, or to establish any verbal or written communication with the child. These findings support the trial court's conclusion that respondent "acted in such a way as to evince a lack of parental concern for the child" and are sufficient to constitute neglect pursuant to G.S. 7A-289.32(2) and G.S. 7A-517(2).

[4] In his next argument, respondent contends that the trial court was precluded from adjudicating that Erica was "neglected"

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pursuant to G.S. 7A-289.32(2) and 7A-517(21) because of the earlier district court orders which contained the conclusion of law that Erica was a "dependent" child as defined by G.S. 7A-517(13). Respondent argues that by its order finding statutory neglect, the court "overruled *sub silentio* a final binding order of another district court." This contention is without merit.

General Statute 7A-517(13) defines a "dependent juvenile" as "[a] juvenile in need of assistance or placement because he has no parent, guardian or custodian responsible for his care or supervision or whose parent, guardian, or custodian is unable to provide for his care or supervision." General Statute 7A-517(21) defines a "neglected juvenile" as:

A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

These definitions are not mutually exclusive. A child may be both "dependent" and "neglected" within the definitions of G.S. 7A-517(13) and (21). Moreover, the issue adjudicated in determining that Erica was a dependent child was the need for a custodial arrangement following her mother's death. Here the issue is whether Erica has been neglected or abandoned by respondent.

[5] Respondent next argues that the trial court erred in basing its conclusion that Erica was a neglected juvenile solely on the fact that respondent murdered Erica's mother and caused Erica to require the custody and care of community social services. Respondent contends that "the trial court decided this case on the basis of its own belief that killing the custodial parent creates an immutable condition of neglect which an incarcerated parent can never remedy." This argument is without merit.

This Court has stated that while the fact that a parent has committed a crime which might result in incarceration is insufficient standing alone to show willful abandonment of the parent's child, the commission of a crime may be relevant or even determinative as to whether a parent has forfeited his parental rights

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under G.S. 7A-289.32(2). *In re Maynor*, 38 N.C. App. 724, 727, 248 S.E. 2d 875, 877 (1978). In the case before us, the trial court's findings and conclusions demonstrate that the court did not rely "solely" on the circumstance of respondent's murder of Erica's mother and his subsequent incarceration in making its determination that Erica was "neglected" pursuant to G.S. 7A-289.32(2). Although the court did consider the fact that respondent murdered Erica's caretaker and custodian causing Erica to require the custody and care of community social services as one factor in its determination, the court also considered respondent's actions and circumstances since the murder in drawing the conclusion that respondent neglected and abandoned his child.

[6] In his next assignment of error, respondent contends that the trial court erred in basing termination of parental rights on G.S. 7A-289.32(4) for failure to pay a reasonable portion of the child's care costs.

General Statute 7A-289.32 provides eight alternative bases for a court's termination of a party's parental rights. One of the alternative bases is a finding that the parent has abused or neglected the child. G.S. 7A-289.32(2). Another of the enumerated alternative grounds for termination of parental rights is G.S. 7A-289.32(4) which states the following:

The child has been placed in the custody of a county Department of Social Services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition, has willfully failed for such period to pay a reasonable portion of the cost of care for the child although physically and financially able to do so.

In its order, the trial court made the conclusion of law that "the petitioners have proved the existence of 'neglect' and 'abandonment,' which are statutory grounds for termination, G.S. 7A-289.32(2) and (4) respectively." As respondent correctly points out and as petitioners concede, G.S. 7A-289.32(4) is inapplicable to the situation in the case now before us. This reference to G.S. 7A-289.32(4) is immaterial, however, since a valid finding on one of the eight grounds enumerated in G.S. 7A-289.32 is sufficient to support an order terminating parental rights. See *In re Moore*, 306 N.C. 394, 404, 293 S.E. 2d 127, 132 (1982), *appeal dismissed*,

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459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed. 2d 987 (1983); *In re Stewart Children*, 82 N.C. App. 651, 655, 347 S.E. 2d 495, 498 (1986). As we discussed earlier, the trial court's conclusion that Erica was neglected pursuant to G.S. 7A-289.32(2) was supported by findings based on clear, cogent, and convincing evidence; therefore we need not address respondent's challenge to the court's conclusion relating to G.S. 7A-289.32(4).

[7] In his sixth argument, respondent contends that the court erred in including in its order terminating his parental rights statements to the effect that petitioners plan to adopt Erica. Respondent contends this finding is not supported by clear, cogent, and convincing evidence. Respondent's argument is without merit.

We first note that proof of a petitioner's plan to adopt the child is not a prerequisite for the institution of a proceeding to terminate the parental rights of the child's parents. General Statute 7A-289.24 lists the parties who are entitled to petition for termination of parental rights. Among the possible petitioners listed is any person who has been judicially appointed as the guardian of the child, G.S. 7A-289.24(2); any person with whom the child has been living continuously for two years or more, G.S. 7A-289.24(5); and any person who has filed a petition for adoption after there has been a determination of abuse or neglect, G.S. 7A-289.24(7). As petitioners in this case fit the first two of the criteria listed above, it is unnecessary that they fit the last. Furthermore, there is sufficient evidence in the record to support the court's finding that petitioners intend to adopt Erica. Plaintiffs allege in their verified complaint that they intend to adopt Erica as soon as possible. Furthermore, respondent testified that petitioners' attorney contacted him prior to the commencement of this proceeding seeking his consent for petitioners' adoption of Erica. In addition, the custodian of Erica's two stepsisters, the current wife of Erica's mother's first husband, testified at trial that petitioners are trying to adopt Erica. Erica's kindergarten teacher also testified that she was aware of petitioners' intent to adopt Erica. This evidence is sufficient to support a finding by the trial court that petitioners planned to adopt Erica if possible.

[8] Respondent's final argument involving the order terminating parental rights involves the dispositional phase of the proceeding

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in the trial court. Specifically, respondent contends that the trial court erred in failing to state the standard of proof employed in making its dispositional determination that the best interests of Erica require termination of respondent's parental rights. This argument is without merit.

General Statute 7A-289.31(a) provides the following:

Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

Our Courts have recognized that a termination of parental rights proceeding involves a two-step process: an adjudication, governed by G.S. 7A-289.30 and a disposition, governed by G.S. 7A-289.31. *Montgomery*, 311 N.C. at 110, 316 S.E. 2d at 252; *In re White*, 81 N.C. App. 82, 85, 344 S.E. 2d 36, 38, *disc. rev. denied*, 318 N.C. 283, 347 S.E. 2d 470 (1986). At the adjudication stage, the petitioner must show the existence of one of the grounds for termination listed in G.S. 7A-289.32 by clear, cogent, and convincing evidence, G.S. 7A-289.30(e); at the disposition stage, the court's decision whether to terminate parental rights is discretionary. *Montgomery*, 311 N.C. at 110, 316 S.E. 2d at 252; *White*, 81 N.C. App. at 85, 344 S.E. 2d at 38.

This Court has held that G.S. 7A-635 and -637 require that the trial judge recite the standard of proof applied in a proceeding based on a petition alleging abuse, neglect, dependence, or undisciplined behavior. *In re Wheeler*, 87 N.C. App. 189, 193, 360 S.E. 2d 458, 460-61 (1987). In the case before us, the trial judge recited the appropriate standard for the finding of neglect pursuant to G.S. 7A-289.30(e) in his conclusions of law and concluded that petitioners had established grounds for neglect pursuant to G.S. 7A-289.32(2) "by clear and convincing evidence." The court thereafter made the following conclusion of law:

The Court specifically finds and concludes that the best interests and welfare of the child would be promoted by termination of the father's rights so that the proposed adoption by Mr. and Mrs. Arthur Clark can proceed.

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We hold that the court below met the requirement of G.S. 7A-635 and -637 by stating the standard used at the adjudication stage of the proceeding; the trial judge was not also required to recite that his decision at the disposition stage of the proceeding was discretionary.

For the foregoing reasons, we find that respondent's contentions regarding the order terminating his parental rights respecting Erica are without merit, and we affirm the order.

II.

Order Directing Payment of Attorney's Fees

At the time petitioners filed their petition for termination of parental rights, they also filed a claim for a declaratory judgment that respondent is not the biological father of Erica. This latter claim was based on two allegations: that respondent and the child's mother were married only a few weeks prior to the birth of the child and that the child bears no physical resemblance to respondent. In response, respondent filed two motions to dismiss the action, a motion for summary judgment on the paternity claim, and a motion for award of attorney's fees. On 24 April 1987, approximately six months after the paternity claim was filed, petitioners filed notice of a voluntary dismissal without prejudice of the declaratory judgment action regarding paternity pursuant to G.S. 1A-1, Rule 41(a)(1). After hearing argument on the matter, the trial judge ordered petitioners to pay \$1,272.25, or \$35.00 per hour for 36.35 hours, to respondent's attorney for the defense against petitioners' paternity claim. Petitioners contend that the trial court erred in entering this order; respondent contends that the trial court erred in awarding fees at the "state-paid rate" of \$35.00 per hour rather than at the market rate acknowledged by the court in its order to be \$95.00 per hour. We shall address petitioners' cross-appeal argument first.

[9] Petitioners first contend that the court could not award attorney's fees pursuant to G.S. 1A-1, Rule 11, recently amended to permit such awards, because the Rule 11 amendment was not effective until after the filing of the claim for declaratory relief on which the award was based. With this contention we agree.

The amendment of Rule 11 of the North Carolina Rules of Civil Procedure was expressly made effective 1 January 1987 and

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is "applicable to pleadings, motions, or papers filed on or after that date." G.S. 1A-1, Rule 11 (effective date note). The claim seeking declaratory relief was filed 23 October 1986. While some of the time for which respondent's attorney was to be reimbursed elapsed after the effective date of the amendment, the order directing payment of counsel fees was based on the claim that was filed before the effective date. Therefore, the trial judge erred in citing Rule 11 of the North Carolina Rules of Civil Procedure as a basis for his order.

[10] This error does not, however, mandate that the court's order be vacated. The trial court also cited G.S. 6-21.5 as authority for its order. Petitioners contend that the award of attorney's fees pursuant to G.S. 6-21.5 was also error. We disagree.

General Statute 6-21.5 states the following:

In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

This Court has defined a "justiciable issue" as an issue that is "real and present as opposed to imagined or fanciful." *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 326, 344 S.E. 2d 555, 565, *disc. rev. denied*, 318 N.C. 284, 348 S.E. 2d 344 (1986). "'Complete absence of a justiciable issue' suggests that it must conclusively appear that such issues are absent even giving the losing party's

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pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss." *Id.* (*citing Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980)).

In support of their allegation that respondent is not the biological father of Erica, petitioners offer the following facts:

1. That Williamson married Erica's mother only a few weeks before Erica's birth;
2. That Erica bore no physical resemblance to Williamson;
3. That Williamson had severe alcoholism problems preceding Erica's birth;
4. That Erica's mother had a reputation for promiscuity;
5. That Williamson's sister testified at Williamson's sentencing hearing (on his plea of guilty to murdering Erica's mother) that she did not know whose baby Erica was;
6. That Williamson kept in close contact with his sister;
7. That Williamson refused to consent to a blood grouping test; and
8. That the Clarks voluntarily dismissed the claim for strategic reasons, and not because the Clarks believed it was unfounded. (In fact, the Clarks strategy, "to get on with the alternative . . . claim," was successful, since the District Court later entered Judgment revoking Williamson's parental rights.)

Of these "facts," only the first and second allegation appeared in petitioners' complaint. Respondent's alcoholism, his contact with his sister, and petitioners' purported reasons for dismissing the claim bear little or no relevance as to whether petitioners' claim presented a "justiciable issue of law or fact." The assertion that Erica's mother had a reputation for promiscuity and respondent's sister's statement at the sentencing hearing are supported by nothing in the record except the bare assertions of petitioners' attorney.

The record shows and the trial court found as fact that throughout the four years of litigation preceding the filing of the paternity action, including a complaint filed in federal court at the

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same time as the paternity action was filed in the State court, petitioners consistently identified respondent as Erica's father. As to respondent's "refusal to consent to a blood grouping test," the trial court noted in its findings that originally the court had issued an order setting out the procedure for obtaining blood tests for respondent and for Erica. A short time thereafter, respondent moved the court for relief from this order claiming the tests were not warranted because of prior court findings identifying respondent as Erica's father and because prior to her death, Erica's mother filed a verified complaint seeking child support for Erica from respondent. Petitioners took a voluntary dismissal of their paternity claim before the court could rule on this motion.

In its conclusions of law, the trial court states, "In the instant case, there was a complete absence of a justiciable issue of law or fact concerning paternity, and there was no good faith basis for asserting and continuing to pursue this claim." The sufficiency of a pleading under the "justiciable issue of law or fact" standard of G.S. 6-21.5 presents a question of law for the court. *Bryant v. Short*, 84 N.C. App. 285, 288, 352 S.E. 2d 245, 247, *disc. rev. denied*, 319 N.C. 458, 356 S.E. 2d 2 (1987); *Sprouse v. North River Ins. Co.*, 81 N.C. App. at 326, 344 S.E. 2d at 565. After a careful review of the complaint and the record, we must agree with the trial court, that there was a total absence of a justiciable issue as to whether respondent is the biological father of Erica. The order awarding respondent attorney's fees for his defense against the paternity action was correct under G.S. 6-21.5.

[11] Finally, respondent contends that the trial court erred in ascertaining the proper rate of pay for the attorney's fee award. Specifically, respondent excepts to the following conclusion of law made by the trial court:

The reasonable fair market value of Ms. Brooks' [respondent's attorney's] services in this case is no less than \$95 per hour. However, because Ms. Brooks was appointed rather than retained, this Court cannot award a fee in excess of the established \$35 per hour rate for court-appointed counsel.

General Statute 7A-451(a)(15) entitles an indigent parent to the services of counsel in an action brought pursuant to Article 24B of Chapter 7A to terminate his parental rights. Accordingly,

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counsel was appointed for respondent in this case. Fees for counsel so appointed are governed by G.S. 7A-458, which states the following:

In districts which do not have a public defender, the court shall fix the fee to which an attorney who represents an indigent person is entitled. In doing so, the court shall allow a fee based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, the time, effort and responsibility involved, and the fee usually charged in similar cases. Fees shall be fixed by the district court judge for actions or proceedings finally determined in the district court and by the superior court judge for actions or proceedings originating in, heard on appeal in, or appealed from the superior court. Even if the trial, appeal, hearing or other proceeding is never held, preparation therefor is nevertheless compensable.

General Statute 6-21.5 authorizes the court to award "a reasonable attorney's fee." The trial court was not limited to the amount fixed by the district court in its payment of counsel appointed to indigent parties. General Statute 6-21.5 is "based on deterring frivolous and bad faith lawsuits by the use of attorney's fees." *Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 603, 344 S.E. 2d 847, 849, modified on other grounds, 320 N.C. 669, 360 S.E. 2d 772 (1986). The purpose of this statute is not served by treating those who bring frivolous suits against indigent parties differently from those who bring frivolous suits against parties who can afford to retain their own counsel. Therefore, the trial court's limitation of the attorney's fee award to the court-appointed rate of \$35.00 per hour was error.

For the foregoing reasons, the trial court's order terminating the parental rights of respondent in and to the child Erica Renee Williamson is affirmed; the order directing payment of attorney's fees is remanded to the trial court for further findings and conclusions consistent with this opinion.

Affirmed in part; remanded in part for further findings and conclusions.

Judges JOHNSON and COZORT concur.

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STATE OF NORTH CAROLINA v. SAM FRANK MANDINA

No. 8710SC631

(Filed 1 November 1988)

1. Criminal Law § 124.1— improper indictment number on judgment—defendant not entitled to arrest of judgment

The trial court's misrecital of the indictment number in the judgment and commitment did not constitute grounds for arrest of judgment, since defendant clearly had notice of the crime charged and was able to prepare his defense.

2. Burglary and Unlawful Breakings § 3— allegations as to time of offense—sufficiency of indictment

Although nighttime is clearly "of the essence" of the crime of burglary, an indictment for burglary is sufficient if it avers that the crime was committed in the nighttime; therefore, failure to allege the hour the crime was committed or the specific year is not grounds for arrest of judgment, nor will the judgment be arrested because the indictment imperfectly refers to the hour of midnight as "12:00 a.m." N.C.G.S. § 15-155.

3. Larceny § 4— felony larceny—sufficiency of indictment

The allegation in the indictment that the larceny was committed "pursuant to a violation of N.C.G.S. § 14-51" was in the language of N.C.G.S. § 14-72(b) and was sufficient to apprise defendant that he was charged with larceny punishable as a felony because it was committed pursuant to a burglary, and the indictment was not required to set forth facts supporting the elements of common law burglary.

4. Constitutional Law § 30— criminal record and parole record of co-conspirator—no right to discovery

Defendant was not prejudiced by the trial court's denial of his motion for production of several items, including the criminal record, parole records and reports, and results of handwriting samples of an alleged co-conspirator and chief witness for the State, since neither N.C.G.S. § 15A-903 nor the common law gives a defendant the right to discover the criminal record of a State's witness; the same rule should apply to a witness's parole record; and the exclusion of the handwriting evidence, even if error, was not prejudicial where defendant did not allege how such evidence was material to his case.

5. Criminal Law § 15— change of venue—trial court's order a nullity—no prejudice to defendant

Though the trial court erred in entering out of session its order denying defendant's motion for change of venue, dated 8 August 1986, *nunc pro tunc* to 23 April 1986, and the order was a nullity, the effect was the same as a denial of defendant's motion, and he failed to show prejudice thereby.

6. Criminal Law § 15.1— pretrial publicity—failure to show prejudice—denial of change of venue proper

Defendant was not prejudiced by the trial court's denial of his motion for a change of venue based on pretrial publicity where the newspaper stories in

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question were noninflammatory accounts of a general factual nature about the arrest or trials of defendant's alleged co-conspirators, the testimony of the State's chief witness, police efforts to extradite defendant from Tennessee, descriptions of the articles stolen, and names, addresses, and dates of the break-ins; ten of the news stories did not mention defendant by name; the most recent articles appeared more than nine months prior to defendant's trial; Wake County is a large, urban community serviced by many different media sources reporting on a vast range of important issues; and the record contained no evidence of venire prejudice.

7. Searches and Seizures § 18— search of vehicle driven by defendant—consent given by owner—admissibility of evidence seized

The trial court did not err in denying defendant's motion to suppress fiber and other evidence obtained by F.B.I. agents from an automobile allegedly driven by defendant from North Carolina to Missouri after the burglaries in question were committed where the evidence tended to show that defendant had paid \$3,500 for the vehicle and was to pay the balance of \$500 at which time title was to be transferred to him; at the time the vehicle was searched, it was at the seller's dealership for minor repairs; title and registration were in the name of the dealership; and the owner of the dealership gave both oral and written consent to the search of the vehicle.

8. Criminal Law § 42.6— fibers seized from car driven by defendant—no “chain of custody” problem raised

Defendant in a prosecution for burglary, larceny, safecracking, and conspiracy did not raise a “chain of custody” problem with regard to fiber evidence seized from a car allegedly driven by defendant where he alleged that the State failed to secure the vehicle, but there was no allegation that the State could not show continuous possession or safekeeping of, or could not properly identify, the evidence to be introduced.

9. Criminal Law § 95.2— jury instruction—lapsus linguae—defendant not prejudiced

The trial court's limiting instruction to the jury regarding evidence of burglaries other than those for which defendant was on trial which included the statement, “you may consider only evidence of other offenses for any purpose other than these which I have just explained to you,” was not prejudicial to defendant, since omission of the word “not” after the word “may” was a lapsus linguae which was not called to the court's attention, was not misleading and did not constitute reversible error.

10. Burglary and Unlawful Breakings § 5.8— breaking and entering and larceny from residence—lack of consent—sufficiency of evidence

In a prosecution of defendant for burglary and larceny, there was no merit to defendant's contention that there was no direct evidence of lack of consent, and he was therefore entitled to have the judgment vacated and a new trial, since the State presented evidence that owners of the residence broken into were out of town at the time of the crime; the house was forcibly entered between 28 and 30 January 1983; and the house was ransacked and various items were missing.

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APPEAL by defendant from *Farmer, Robert L., Judge*. Judgments entered 18 December 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 9 December 1987.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General James B. Richmond and Assistant Attorney General John F. Maddrey for the State.

John T. Hall for defendant appellant.

COZORT, Judge.

Defendant was tried, along with codefendant Gary Gene Williams, not a party to this appeal, on six counts of second-degree burglary, six counts of felonious larceny, one count of safe-cracking, and one count of conspiracy. Except for the conspiracy charge, which alleged a conspiracy to commit burglary between 10 June 1982 and 26 February 1983, all of the charges stemmed from six break-ins occurring on the weekend of 28, 29, and 30 January 1983. At trial, the State's evidence consisted principally of the testimony of William Nobe, an alleged co-conspirator who testified pursuant to a plea arrangement. Nobe testified that defendant and other individuals came to Raleigh from Missouri on several occasions, including the January weekend in question, when they burglarized homes in expensive neighborhoods and stole items of sterling silver, jewelry, guns, and other valuable antiques. The owners of the residences burglarized on the January weekend testified, as did victims of burglaries that took place in August of 1982 and February of 1983. The State also presented various items of physical evidence, including fiber evidence seized from a 1978 Oldsmobile Cutlass allegedly driven by defendant to Missouri following the burglaries, which was compared with fibers taken from a Raleigh motel where defendant allegedly stayed.

From judgments imposing sentences totaling 153 years in prison, following conviction on all counts, defendant appeals. We affirm.

Defendant presents fifteen assignments of error, which, he contends, entitle him to a new trial.

[1] Three assignments of error challenge the sufficiency of several of the indictments under which defendant was tried. First,

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defendant assigns as error the entry of judgment and commitment for conspiracy because the judgment and commitment refer to a case numbered 85CRS73210, whereas the bill of indictment is numbered 85CRS73610. He argues that, absent a valid bill of indictment numbered 85CRS73210, he is entitled to an arrest of judgment on the conspiracy charge and, further, that without the umbrella charge of conspiracy, joinder of offenses occurring on separate dates was improper. We find no error.

Defendant was charged with conspiracy under a proper bill of indictment numbered 85CRS73610. He alleges no defects in that bill. Thus, there is no "absence" of a valid charge of conspiracy as defendant claims. Furthermore, the record indicates that the parties conducted pretrial and trial proceedings under the impression that the bill of indictment charging defendant with conspiracy was numbered 73210 rather than 73610. Defendant's waiver of arraignment and plea of not guilty referred to 73210, as did his other motions, including motion for a change of venue and motion to sever. Defendant clearly had notice of the crime charged and was able to prepare his defense. *State v. Hicks*, 86 N.C. App. 36, 39, 356 S.E. 2d 595, 597 (1987). Therefore, the trial court's misrecital of the indictment number did not prejudice defendant and does not constitute grounds for arrest of judgment. The assignment of error is overruled.

[2] Defendant also contends that he is entitled to arrest of judgment on the burglary charges on the ground that the indictments were fatally defective because of errors or omissions as to the date or time of the offense alleged. Each count of burglary charged defendant with breaking and entering an identified dwelling "during the nighttime between the hours of 8:30 pm and 12:00 am" on a specific month, day, and year—except for case numbered 83CRS 39436A, which alleges that the burglary occurred on "the 28th day of January 19--." Defendant contends that there is no hour of "12:00 am" as opposed to "12:00 midnight" and that that error, as well as the omission of year in 83CRS39436A, renders each indictment invalid on its face. This contention has no merit.

N.C. Gen. Stat. § 15-155 provides: "No judgment upon any indictment for felony or misdemeanor . . . shall be stayed or reversed . . . for omitting to state the time at which the offense was committed in any case where time is not of the essence of the

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offense, nor for stating the time imperfectly" Although nighttime is clearly "of the essence" of the crime of burglary, an indictment for burglary is sufficient if it avers that the crime was committed in the nighttime. *State v. Wood*, 286 N.C. 248, 254, 210 S.E. 2d 52, 55 (1974). Therefore, failure to allege the hour the crime was committed, *id.*, or the specific year, see *State v. Hawkins*, 19 N.C. App. 674, 199 S.E. 2d 746 (1973), is not grounds for arrest of judgment. Similarly, the judgment will not be arrested because the indictment imperfectly refers to the hour of midnight as "12:00 am." We therefore overrule this assignment of error.

[3] There is likewise no merit to defendant's argument that the indictments for felonious larceny are invalid for failure to allege the essential elements of the offense. Each larceny count, which follows the corresponding second-degree burglary count in each of the six bills of indictment, is in the following language:

AND THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the (date of the offense) in Wake County Sam Frank Mandina unlawfully and wilfully did feloniously steal, take and carry away (see xeroxed copy attached hereto as Exhibit A and incorporated herein by reference), the personal property of (name of owner-victim) pursuant to a violation of Section 14-51 of the General Statutes of North Carolina. This larceny was in violation of the following law: N.C.G.S. 14-72(b)(2).

Defendant appears to argue that, since he was tried and convicted of larceny pursuant to a burglary, the indictment was required to set forth not only facts supporting the elements of common law larceny and the statutory basis for punishment as a felony, but also facts supporting the elements of common law burglary. The counts in question, however, charge defendant with felony larceny, not burglary; the burglary charges are set forth in separate counts. N.C. Gen. Stat. § 15A-924(a)(5) states that a criminal pleading must contain "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." In order to charge a defendant with *felony* larceny, without regard to the

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value of the property stolen, the bill of indictment must contain, in addition to the elements of common law larceny, one or more of the following statutory elements set forth in § 14-72(b):

- (1) From the person;
- (2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57;
- (3) Of any explosive or incendiary device or substance;
- (4) Of any firearm; or
- (5) Of any record or paper in custody of the N.C. Archives.

See N.C. Gen. Stat. § 14-72(b) (1987); *State v. Cleary*, 9 N.C. App. 189, 192, 175 S.E. 2d 749, 751 (1970). Section 14-72 "relates solely to punishment for the separate crime of larceny," *State v. Brown*, 266 N.C. 55, 63, 145 S.E. 2d 297, 303 (1965) (Bobbitt, J., concurring), and does not change the nature of the common law offense. *State v. Smith*, 66 N.C. App. 570, 576, 312 S.E. 2d 222, 226, *disc. rev. denied*, 310 N.C. 747, 315 S.E. 2d 708 (1984). The allegation that the larceny was committed "pursuant to a violation of G.S. 14-51" is in the language of § 14-72(b) and was sufficient to apprise defendant that he was charged with larceny punishable as a felony because it was committed pursuant to a burglary. This assignment of error is overruled.

Defendant further assigns as error the trial court's pretrial rulings on a motion for discovery, a motion for change of venue, and two motions, a motion to suppress and a motion in limine, aimed at excluding fiber evidence taken from the vehicle allegedly driven by defendant following commission of the burglaries. We note at the outset that defendant's brief does not comply with Rule 28(b)(5) of the Rules of Appellate Procedure, as defendant has failed to state separately each question presented followed by the assignment of error and exception pertinent to the question. Nonetheless, we have elected, in our discretion, to consider the arguments.

[4] The record discloses that prior to trial defendant made a motion for the production of several items, including the criminal record, parole record and reports, and results of handwriting samples of William Nobe, an alleged co-conspirator and a chief

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witness for the State. The motion was denied. We find no prejudicial error.

N.C. Gen. Stat. § 15A-903 sets forth the types of information discoverable from the State. Neither this statute nor the common law gives a defendant the right to discover the criminal record of a witness for the State. *State v. Ford*, 297 N.C. 144, 148, 254 S.E. 2d 14, 17 (1979). We think the same rule should apply to a witness's parole record.

The discovery statute would, however, allow a defendant access to reports of handwriting analysis made in connection with a case. See N.C. Gen. Stat. § 15A-903(e) (1987). It was arguably error to deny defendant's motion to produce results of analyses of Nobe's handwriting. Nevertheless, defendant has made no showing that the trial court's ruling affected the preparation or presentation of his defense, to his prejudice, as required by N.C. Gen. Stat. §§ 15A-1442, -1443 (1987). Specifically, defendant has not alleged how the handwriting analysis report was material to his case, or whether or how the State intended to use the information at trial. Defendant has not directed us to any portion of the transcript showing that the State introduced or used this evidence. We note, however, that at trial counsel for codefendant Williams introduced a carbon copy of the report, apparently in an effort to raise doubt about the truthfulness of Nobe's testimony that he had signed motel registration cards on weekends when the burglaries were committed. If the value of the report was limited to impeachment evidence, we fail to see how defendant was prejudiced. The information contained in the report was made available to codefendant's counsel and was in fact put before the jury. Furthermore, the S.B.I agent who prepared the report testified that the analysis was inconclusive as to authorship. Thus, the report's value in impeaching Nobe's direct testimony is doubtful. The assignment of error is overruled.

Next, defendant assigns as error the trial court's denial of a pretrial motion for change of venue. In his motion, defendant argued that unfavorable pretrial media publicity and the fact that many of State's witnesses were prominent Wake County citizens, including a superior court judge, mandated transfer from Wake County. Attached to his motion were twenty-three newspaper ar-

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ticles that appeared in newspapers of general circulation in Wake County.

N.C. Gen. Stat. § 15A-957 provides for change of venue when the trial court "determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial . . ." The burden of proof in a hearing on a motion for change of venue is on the defendant. *State v. Brown*, 13 N.C. App. 261, 185 S.E. 2d 471 (1971), *cert. denied*, 280 N.C. 723, 186 S.E. 2d 925 (1972). A ruling on a motion for change of venue is addressed to the discretion of the trial court and will not be disturbed on appeal unless a manifest abuse of such discretion is shown. *State v. Boyd*, 20 N.C. App. 475, 201 S.E. 2d 512, *appeal dismissed*, 285 N.C. 86, 203 S.E. 2d 59, *cert. denied*, 419 U.S. 860, 42 L.Ed. 2d 95, 95 S.Ct. 111 (1974).

[5] Before examining the merits of defendant's motion, we must consider the trial court's procedural error in entering out of session its order denying the motion for change of venue, dated 8 August 1986, *nunc pro tunc* to 23 April 1986. Unless an oral ruling is made in open court, *State v. Horner*, 310 N.C. 274, 279, 311 S.E. 2d 281, 285 (1984), an order substantially affecting the rights of parties to a cause pending in the superior court at a term must be made in the county and at the term when and where the question is presented, and, except by agreement of the parties, may not be entered otherwise. *State v. Boone*, 310 N.C. 284, 287, 311 S.E. 2d 552, 555 (1984). An order entered contrary to this rule is a nullity, *id.* at 286, 311 S.E. 2d at 555, and entering an order *nunc pro tunc* does not change this result. *Thompson v. Gennett*, 255 N.C. 574, 122 S.E. 2d 205 (1961). However, while prejudice to the defendant is not a factor affecting the nullity of the order, *State v. Boone*, 310 N.C. at 288, 311 S.E. 2d at 556, it is a factor determinative of defendant's right to a new trial. See *State v. Partin*, 48 N.C. App. 274, 283, 269 S.E. 2d 250, 255, *disc. review denied and appeal dismissed*, 301 N.C. 404, 273 S.E. 2d 449 (1980), holding that failure to rule on defendant's motion for a change of venue was, in effect, a denial of that motion, but that defendant had shown no prejudice. We therefore turn to the merits of defendant's motion.

[6] After carefully examining the motion, including the news stories attached to it, we conclude that defendant was not preju-

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diced by having his case heard in Wake County. While four of the news stories refer to "the Mandina Gang," the stories are noninflammatory accounts of a general factual nature about the arrest or trials of defendant's alleged co-conspirators, the testimony of State's witness Nobe, police efforts to extradite defendant from Tennessee, descriptions of the articles stolen, or names, addresses, and dates of the break-ins. Ten of the news stories do not mention defendant by name. The most recent articles appeared more than nine months prior to defendant's trial. We also note that Wake County is a large, urban community serviced by many different media sources reporting on a vast range of important issues. Finally, the record contains no evidence of venire prejudice. Defendant must do more than present evidence of pretrial publicity; he must "go forward with evidence tending to affirmatively show that prospective jurors in his case were reasonably likely to base their verdict upon conclusions induced by outside influences . . ." *State v. McDougald*, 38 N.C. App. 244, 249, 248 S.E. 2d 72, 78 (1978), *disc. review denied and appeal dismissed*, 296 N.C. 413, 251 S.E. 2d 472 (1979). The record does not contain the *voir dire* examination of the jury, and we are thus unable to find that any juror had prior knowledge or opinion about the case, or that defendant had to accept any juror objectionable to him. See *State v. Harrill*, 289 N.C. 186, 191, 221 S.E. 2d 325, 328-29, *death penalty vacated*, 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3212 (1976). We also note that, unlike the defendant in *State v. Boone*, defendant here did not object to the trial court's entering the order *nunc pro tunc* or renew his motion at any time prior to trial. The assignment of error is overruled.

[7] Next, defendant assigns error to the trial court's denial of his motion to suppress fiber and other evidence obtained by F.B.I. agents from a 1978 Oldsmobile Cutlass. The car was located in Missouri and allegedly had been driven by defendant from North Carolina after the burglaries in question were committed. In support of his motion, defendant submitted the affidavit of Crawford, the owner of the car dealership where the vehicle was parked, who stated that defendant had paid \$3,500.00 for the vehicle and was to pay the balance of \$500.00, at which time title was to be transferred to defendant. He also stated that at the time the vehicle was searched by F.B.I. agents, it was at his dealership for minor repairs, the nature of which he did not recall. However,

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Crawford also stated that title and registration were in the name of Crawford's business. Defendant contends that the search was a violation of his Fourth Amendment rights because he was the owner of the vehicle and did not consent to the search. We do not agree.

N.C. Gen. Stat. § 15A-221 provides that "a law enforcement officer may conduct a search and make seizures, without a search warrant or other authorization, if consent to the search is given." Section 15A-222 further provides that "[t]he consent needed to justify a search and seizure under G.S. 15A-221 must be given . . . [b]y the registered owner of a vehicle to be searched or by the person in apparent control of its operation and contents at the time consent is given . . ." N.C. Gen. Stat. § 15A-222 (1987).

Similarly, a search is not unreasonable within the meaning of the Fourth Amendment of the U.S. Constitution or Article I, Section 20, of the N.C. Constitution, when lawful consent to the search is given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973); *State v. McPeak*, 243 N.C. 243, 245, 90 S.E. 2d 501, 503 (1955), cert. denied, 351 U.S. 919, 100 L.Ed. 1451, 76 S.Ct. 712 (1956). Our courts have often found that consent given by the owner or person lawfully in control of a vehicle is sufficient to justify a search that yields evidence used against a non-consenting passenger. See, e.g., *State v. Hamilton*, 264 N.C. 277, 285, 141 S.E. 2d 506, 512 (1965), cert. denied, 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966); *State v. Dawson*, 262 N.C. 607, 138 S.E. 2d 234 (1964); *State v. McPeak*, 243 N.C. 243, 90 S.E. 2d 501 (1955), cert. denied, 351 U.S. 919, 100 L.Ed. 1451, 76 S.Ct. 712 (1956); *State v. Jefferies and State v. Person*, 41 N.C. App. 95, 254 S.E. 2d 550, cert. denied, 297 N.C. 614, 257 S.E. 2d 438 (1979). Furthermore, a defendant who has no ownership or possessory interest in the vehicle searched has no "legitimate expectation of privacy" in that vehicle, and, accordingly, no standing to object to the search. *State v. Melvin*, 53 N.C. App. 421, 425, 281 S.E. 2d 97, 100 (1981), cert. denied, 305 N.C. 762, 292 S.E. 2d 578 (1982).

Although defendant alleges ownership, he was not the registered owner. At the suppression hearing, the F.B.I. agent who conducted the search testified that Crawford stated that he owned the vehicle and gave both oral and written consent to the search of the vehicle. The written consent was placed in evidence,

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as were a bill of sale that contained no purchaser signature and a temporary permit application in Crawford's name. Based on this evidence, the trial court found that Crawford was the owner of the vehicle and had the authority to and did consent to the search. Therefore, the court concluded that defendant had no standing to object to the search. This conclusion is supported by the findings, which are based on competent evidence and will not be disturbed on appeal. *Cogdill v. North Carolina State Highway Comm'n*, 279 N.C. 313, 182 S.E. 2d 373 (1971). Accordingly, the assignment of error is overruled.

[8] By another assignment of error, defendant contends that the trial court erred in denying his oral motion in limine to suppress the fiber evidence taken from the 1978 Oldsmobile Cutlass, because there was "no clean chain of custody." Defendant anticipated, as was the case, that the State would introduce fiber evidence during the testimony of its expert witness, who would testify that some of the fibers taken from the trunk carpet and rear floor mat of the vehicle were consistent with fibers taken from a burglarized home and that other fibers matched those taken from hallway carpet at the motel where defendant allegedly stayed. We find no error.

On *voir dire*, the F.B.I. agent who seized the mat and carpet testified that when he located the vehicle on 4 March 1983, he did not seize any evidence but told Crawford to secure the vehicle, and that Crawford moved the vehicle into the garage. However, when the agent returned to collect evidence on 7 March 1983, the vehicle had been moved by Crawford's son or brother to make room in the garage. Defendant argues that this failure to secure the vehicle precluded a show of chain of custody necessary for introduction of the fiber evidence.

We first note that "any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *State v. Campbell*, 311 N.C. 386, 389, 317 S.E. 2d 391, 392 (1984). However, defendant's argument, strictly analyzed, does not raise a chain of custody problem. There is no allegation that the State could not show continuous possession or safekeeping of, or could not properly identify, the evidence to be introduced. Rather, defendant argues that the source of the evidence, the vehicle, had been contaminated by the possible introduction of

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fibers by third parties due to the State's failure to secure the vehicle. In our view, as long as the State laid proper foundation authenticating the evidence as the fibers actually seized from the vehicle, *see State v. Taylor*, 56 N.C. App. 113, 114, 287 S.E. 2d 129, 130 (1982), defendant's argument goes to the weight of the evidence rather than to the admissibility of it. The assignment of error is overruled.

[9] Defendant also assigns error to the trial court's limiting instruction to the jury regarding evidence of burglaries other than those for which defendant was on trial. The instruction given by the trial court was as follows:

THE COURT: Members of the jury, the Court would like to give you a short instruction at this time concerning evidence that may be presented, either this afternoon or some time after today.

It's my understanding that some evidence may be presented during the trial of this case of the commission of offenses other than the six incidents occurring in January of 1983.

Such evidence, if offered by the State, may be considered by you in determining whether or not the defendants were participants in a conspiracy to commit burglary as alleged, with respect to the six charges of burglary and larceny, and the charge of safecracking, you may not consider evidence of other crimes as evidence of bad character or that the defendants acted in conformity therewith.

However, you may consider such evidence of other offenses, if you find it to be probative of the defendants' motive, opportunity, intent, preparation, plan, knowledge, or identity as the perpetrators of the offenses which they are charged with committing in January of 1983.

You may consider any evidence of other offenses for any purpose other than these which I have just explained to you.

Defendant argues that the court's omission of the word "not" after "may" in the last sentence constitutes reversible error. The proper action, however, would have been to call the trial court's attention to its misstatement; this the defendant did not do. Nevertheless, we view the court's omission as a mere "lapsus linguae"

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which, in light of the whole instruction given, was not misleading and does not constitute reversible error, particularly since the judge's final charge to the jury contained no misstatement. *See State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247, 104 S.Ct. 263 (1983). Therefore, this assignment of error is overruled.

Defendant also assigns as error the admission of testimony from a St. Louis, Missouri, police officer about statements made by codefendant Williams. There is no merit to this assignment. There is no allegation that the joint trial was improper, *see N.C. Gen. Stat. § 15A-926(b)* (1987), and no evidence that codefendant's statement implicated defendant. *State v. Fox*, 274 N.C. 277, 291, 163 S.E. 2d 492 (1968). Furthermore, the judge instructed the jury not to consider Williams' statements as to defendant. *See State v. Lynch*, 266 N.C. 584, 146 S.E. 2d 677 (1966). The assignment of error is overruled.

[10] Defendant also assigns error to the verdict and entry of judgment in 83CRS39390, charging defendant with burglary and larceny at the Cottle residence. Defendant contends that, because there is no direct evidence of lack of consent, he is entitled to a vacating of this judgment and a new trial. We disagree.

Lack of consent is an essential element of the crime of larceny. *State v. Jackson*, 75 N.C. App. 294, 330 S.E. 2d 668 (1985). While the State must show the lack of consent by sufficient competent evidence, this evidence may be either direct or circumstantial in nature, if "the circumstances [raise] a logical inference of the fact to be proved and not just a mere suspicion or conjecture." *State v. Boomer*, 33 N.C. App. 324, 327, 235 S.E. 2d 284, 286, *cert. denied*, 293 N.C. 254, 237 S.E. 2d 536 (1977). *See also State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974).

The State presented evidence that the Cottles, owners of the residence, were out of town at the time of the crime and that their daughter periodically checked the house to make sure it was secure; that when she checked the house on Friday, 28 January 1983, all doors and windows were locked; that when she checked the house on Sunday, 30 January 1983, the house had been forcibly entered through the basement door and that drawers were standing open, rugs turned over, jewelry cases emptied, silver items disarranged, and jewelry and shotguns were missing. In ad-

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dition, Ms. Cottle testified that she had feared a robbery would occur and that before leaving town she had taken most of her valuables out of the house and had left a note for the robbers to "please go away." This evidence, viewed in the light most favorable to the State, *see State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981), is sufficient to support a finding of lack of consent. *State v. Currie*, 53 N.C. App. 485, 281 S.E. 2d 66 (1981). The assignment of error is overruled.

We have reviewed defendant's remaining assignments of error and find no need to discuss them, except to say that they have no merit. *See State v. Tomblin*, 276 N.C. 273, 277, 171 S.E. 2d 901, 904 (1970).

We conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges BECTON and EAGLES concur.

JANE S. HARRIS, PLAINTIFF v. VAN T. HARRIS, DEFENDANT

No. 882DC235

(Filed 1 November 1988)

1. Divorce and Alimony § 24.4— child support—failure to comply with order—willfulness required in order to find contempt—voluntary bankruptcy as willfulness

Before a person may be held in civil contempt for failure to comply with a child support order and punished by proceedings for criminal contempt, his failure to comply with the court order must be willful; however, a defendant may not deliberately divest himself of his assets by voluntarily placing them in bankruptcy and thereby render himself unable to comply with the order so that he can escape a contempt citation. N.C.G.S. § 50-13.4(f)(9); N.C.G.S. § 5-21.

2. Divorce and Alimony § 24.5— child support—voluntary filing of bankruptcy—no change of circumstances warranting reduction in payments

Defendant's voluntary filing of a petition in bankruptcy did not constitute a substantial change of circumstances which would warrant a reduction in his child support payments where the record revealed that defendant had ample opportunities and assets through which he could have reorganized his finances and also fulfilled his financial responsibility to his family.

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3. Divorce and Alimony § 27— child support—award of attorney's fees without proper findings—error

The trial court erred in awarding plaintiff attorney's fees in an action for child support where the court failed to make any statutorily required findings of fact as to whether plaintiff acted in good faith and had insufficient means to defray the expenses of the action and whether defendant refused to provide adequate support under the circumstances existing at the time of the institution of the action. N.C.G.S. § 50-13.6.

APPEAL by defendant from *Ward, Judge*. Order entered 28 October 1987 in District Court, MARTIN County. Heard in the Court of Appeals 31 August 1988.

Smith and Daly, P.A., by Lloyd C. Smith, Jr.; Hopkins & Allen, Attorneys at Law, by Grover Prevatte Hopkins and John Francis Oates, Jr., for plaintiff-appellee.

Stubbs, Perdue, Chesnutt & Wheeler, P.A., by Gary H. Clemmons, for defendant-appellant.

JOHNSON, Judge.

Defendant appeals from an order which: (1) found him in willful contempt of a previously entered child support order; (2) denied his motion for a reduction in child support payments based upon "changed circumstances"; and (3) granted attorney's fees to the plaintiff.

Plaintiff and defendant entered a union of marriage on 22 June 1974. Three children were born of this union, to wit: Katherine Styons Harris, born 27 March 1975; Holley Taylor Harris, born 19 December 1976; and Justin Dixon Harris, born 31 March 1978.

On 2 October 1985, plaintiff instituted an action against defendant in which she sought child custody, child support, alimony, equitable distribution of the marital property and attorney's fees. On 22 November 1985, the parties executed a consent judgment effective retroactively as of 24 October 1985, the pertinent terms of which appear as follows: legal and physical custody of the couple's three minor children were awarded to plaintiff; defendant agreed to pay \$1,000.00 per month as child support; and defendant agreed to convey to the minor children a remainder interest in a parcel of land known as the "Roebuck Farm," reserving a life estate in himself.

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On 11 December 1985, plaintiff and defendant entered into a separation agreement in which they ratified and incorporated the terms of the aforementioned consent judgment. Defendant herein sued for and was granted an absolute divorce on 30 December 1985 based upon one year's separation. The judgment of divorce incorporated by reference the terms of the 11 December 1985 separation agreement.

On 25 September 1986, a hearing was held in the District Court of Martin County pursuant to a show cause order filed by plaintiff which cited defendant's failure to comply with the child support provision of the separation agreement which had been incorporated into the judgment of divorce. At the time of the hearing, defendant was in arrears on his obligation to pay child support in the amount of \$2,144.00. At this hearing, the court also heard defendant's motion to reduce his monthly child support obligation. Defendant contended that his filing a petition in bankruptcy under 11 U.S.C.S. sec. 1121 (1984), by which he sought to reorganize his finances, constituted a substantial change in circumstances which would warrant a reduction in the child support payment of \$1,000.00 per month he had agreed to pay in the 24 October 1985 consent judgment.

In its order of 25 September 1986, the trial court ordered defendant to convey the life estate he had retained in the "Roebuck Farm" to his minor children so that the farm could be leased or sold and the proceeds applied toward their support. The court also adjudged defendant's failure to comply with the support order to be willful and in contempt of court, and denied his motion for reduction in child support payments.

After the entry of this order, defendant filed a petition in the United States Bankruptcy Court, to be evaluated in light of his pending bankruptcy proceeding, to have the original transfer of the remainder interest in the "Roebuck Farm" to his children, as well as the subsequent court ordered transfer of his life estate in the farm, declared void. On 17 September 1987, an order was entered in Federal Bankruptcy Court for the Eastern District of North Carolina declaring that the life estate in question was in fact property of the bankrupt estate and was unavailable for satisfaction of delinquent child support payments. The Court also determined that plaintiff could continue her action for child sup-

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port in state court and could attempt to collect upon any of defendant's properties which were not included in the bankrupt estate.

On 28 October 1987, plaintiff's second show cause order alleging defendant's failure to make the court ordered child support payments, along with defendant's second motion for a reduction in child support payments, came on for hearing in the District Court of Martin County. The court determined that as of the hearing date, defendant had incurred an arrearage of \$11,400.00 and that his failure to comply with the child support provision of the 30 December 1985 judgment of divorce was willful and in contempt of court. The court then ordered defendant to pay \$300.00 per month child support pending the outcome of his petition in bankruptcy, as well as \$3,302.40 to plaintiff for her attorney's fees. From this order, defendant appeals.

Defendant contends on appeal that the trial court abused its discretion in (1) finding him in willful contempt for his failure to make the court ordered child support payments; (2) denying his motion for reduction in the child support payments; and (3) awarding attorney's fees to plaintiff.

[1] Defendant first argues that although G.S. sec. 50-13.4(f)(9) and G.S. sec. 5A-21 have deleted the term "willful" from their present versions, the case law in this state continues to require a showing of willful disobedience of the court order before a person may be held in contempt for failing to comply with a child support order. He further argues that since his voluntary placement of his assets in bankruptcy left him with a salary of only \$500.00 per month as authorized by the bankruptcy court, then his noncompliance with the child support order of \$1,000.00 per month was not only "non-willful" but impossible.

We agree with defendant's contention that before a person may be held in civil contempt for failure to comply with a child support order (G.S. sec. 50-13.4(f)(9)) and punished by proceedings for criminal contempt pursuant to G.S. sec. 5A, his failure to comply with the court order must be willful. *Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981). However, it is also well established that a defendant may not deliberately divest himself of his assets and thereby render himself unable to presently comply with the order to provide support and thus escape a contempt

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citation. *Bennett v. Bennett*, 21 N.C. App. 390, 204 S.E. 2d 554 (1974).

We see no reason to distinguish this voluntary purging of assets in bankruptcy in the case *sub judice* from a situation where a defendant voluntarily takes on additional financial obligations, *Williford v. Williford*, 56 N.C. App. 610, 289 S.E. 2d 907 (1982); fails to take a job that would enable him to make payments, *Frank v. Glanville*, 45 N.C. App. 313, 262 S.E. 2d 677 (1980); or terminates former employment and assumes a lower-paying position, *Bennett, supra*, in order to avoid complying with a child support order.

In its order of 28 October 1987, the trial court specifically found the following facts:

29. Because of the unencumbered state of the large amount of farm equipment owned by the Defendant, because of the unencumbered state of the life estate of the Defendant in the F. J. Roebuck Farm, and because of his present earnings and earnings potential, the Defendant has the means and estate whereby he can comply with the child support order previously entered herein; although, the [Defendant's] voluntary filing of a Chapter 11 Petition Reorganization in Bankruptcy Court has, as a practical matter, limited this Court's authority to deal with the assets of the Defendant until such time as the Reorganization Plan of the Defendant is either approved or disapproved by the Bankruptcy Court.

30. The Defendant has been unable to demonstrate to the Court what, if any, decrease in his earning ability or his present earnings exist.

The court then reached these conclusions of law:

3. There has been no change of circumstances since September 25, 1986, as would require or allow this Court to modify the amount of support which the Defendant is required to pay.

4. The failure of the Defendant to comply with the terms of child support contained in the judgment dated October 24, 1985, is willful and in contempt of this Court.

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5. Because the Defendant has voluntarily filed a Chapter 11 Petition in Bankruptcy Court, this Court cannot order the sale of the substantial assets of the Defendant to comply with the prior order of child support entered herein; and prior to incarcerating the Defendant for contempt or ordering the sale of the assets of the Defendant to comply with the prior order of child support entered herein, the Court must await the ratification of the plan of the Defendant in Bankruptcy Court or the rejection of his plan in Bankruptcy Court.

6. The Defendant's failure to pay child support is willful, as except for his voluntary placement of his assets into the control of the United States Bankruptcy Court, he would have the means and ability to comply with the prior child support order entered herein, . . .

We find and so hold that these findings of fact and conclusions of law are supported by competent evidence. Having found that they are sufficient to warrant the order entered by the trial court, we also hold that they are conclusive on appeal. *Williford, supra.*

[2] Defendant next argues that his voluntary filing of a petition in bankruptcy constitutes a "substantial change of circumstances" which would warrant a reduction in his child support payments. He contends that the "depression in the farm community in 1986 and 1987" required him to seek protection from his creditors, and therefore his ability to pay should be determined by his actual income of \$500.00 per month and not his earning capacity. *Goodhouse v. DeFravio*, 57 N.C. App. 124, 290 S.E. 2d 751 (1982) allows a court to use earning capacity rather than actual earnings either as the basis for setting an award of child support or in evaluating a request for a modification where it is found that the supporting spouse is deliberately suppressing his income or acting in disregard of his obligation to provide support.

We find that the court committed no abuse of discretion in denying defendant's request for a modification of the child support order. The record is replete with evidence to support this conclusion of law. At the time when the child support order was entered, defendant agreed that his gross estate totalled not less than \$2,473,476.00. In the spring and summer of 1986, defendant sold parcels of land totalling \$33,100.00. Defendant also had a

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gross income from 11 August 1986 to 11 October 1987 of not less than \$83,654.72 which was reported to the Bankruptcy Court for distribution to his creditors. After the trial court ordered defendant to convey his life estate in the "Roebuck Farm" to his three minor children, defendant reported this action to the Bankruptcy Court which voided the conveyance. If this conveyance had been allowed to stand, defendant's minor children would have received not less than \$7,000.00 per year from the rental of the farmland.

These facts indicate that defendant is acting in disregard of his support obligation to his three minor children. Although it was his prerogative to reorganize his finances, the record reveals ample opportunities and assets through which he could have accomplished that goal and also fulfilled his financial responsibility to his family.

[3] Lastly, defendant argues that the court abused its discretion by awarding attorney's fees to the plaintiff pursuant to G.S. sec. 50-13.6. We agree.

G.S. sec. 50-13.6 provides in pertinent part that:

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, *the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; . . .* (Emphasis added.)

Defendant aptly notes that a trial judge may exercise considerable discretion in allowing or disallowing attorney's fees in cases involving child support. *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E. 2d 177 (1971). However, the trial court's discretion in awarding attorney's fees is limited not only by the abuse of discretion standard, but also by the requirements of G.S. sec. 50-13.6. *Id.* Our review of the trial court's findings indicates an abuse of discretion in that the trial court failed to follow the mandate of

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the statute. In the portion of the 28 October 1987 order which relates to attorney's fees, the court stated the following:

FURTHER the Court having determined that the Plaintiff is entitled to recover her reasonable attorney's fees, received additional evidence, as to the nature of the services rendered to the Plaintiff by her attorneys, . . . and makes the following findings of fact:

With the exception of the last finding of fact, which relates to defendant's ability to pay the attorney's fees, all of the findings relate to the reasonableness of the fee charged. These required findings as to the reasonableness of the fee, *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971), are detailed and quite adequate. However, the findings as a whole are insufficient to support the award, as the statutory requirements were not met.

Thus, to award attorney's fees in a child support action, the trial court must find as fact that (1) the interested party (a) acted in good faith and (b) has insufficient means to defray the expenses of the action and further, that (2) the supporting party refused to provide adequate support 'under the circumstances existing at the time of the institution of the action or proceeding.' [G.S. sec. 50-13.6.]

Brower v. Brower, 75 N.C. App. 425, 429, 331 S.E. 2d 170, 174 (1985) (citations omitted).

The trial court's order is devoid of any of the aforementioned statutorily required findings of fact. Therefore, the award of attorney's fees cannot stand. We therefore affirm the trial court in every respect except as to attorney's fees. In that regard, we vacate and remand this case to the trial court so that it may make additional findings of fact on the issue of attorney's fees.

Affirmed in part, vacated and remanded in part.

Judges PARKER and COZORT concur.

State v. Alston

STATE OF NORTH CAROLINA v. ROBERT ALSTON, JR.

No. 8821SC237

(Filed 1 November 1988)

1. Narcotics § 4.3— constructive possession of cocaine—sufficiency of evidence

Evidence was sufficient to permit the jury to infer defendant's constructive possession of cocaine found in a building over which defendant did not have exclusive control where defendant was arrested in the same room where police found the cocaine in plain view, and defendant had a large amount of cash on his person.

2. Narcotics § 4— possession of cocaine with intent to sell—sufficiency of evidence

Evidence of defendant's intent to sell was sufficient to support his conviction of possession of cocaine with intent to sell where defendant was arrested in a room where police found in plain view 20 separate envelopes containing a total of 4.27 grams of cocaine and defendant had on his person \$10,638 in cash.

3. Narcotics § 4— maintaining building for purpose of keeping or selling cocaine—residence not required—sufficiency of evidence

There was no merit to defendant's contention that evidence was insufficient to show that he resided in a building where cocaine was found and that he therefore could not be convicted under N.C.G.S. § 90-108(a)(7), (b) for intentionally maintaining a building for the purpose of keeping and selling a controlled substance, since the statute does not require residence; defendant's payment of rent and possession of the key to the padlock supported the inference that he maintained the building; evidence that he did not actually reside there permitted the inference that he maintained it for an illegal purpose; prior to defendant's arrest, police observed numerous people stopping at the building for short times and then leaving; and defendant was arrested in the building in the same room where cocaine was found at a time when he had a large amount of cash on his person and when approximately fifteen people were present.

4. Narcotics § 3.2; Constitutional Law § 65— money seized from defendant—failure of State to return—evidence as to existence of money properly admitted

The State's failure to comply with an order directing the return of money seized from defendant's person upon his arrest for possession of cocaine with intent to sell did not preclude the State from presenting evidence of the money's existence; nor did the State's failure to produce the money violate defendant's constitutional right to confront witnesses against him, as that right applies only to witnesses and not to physical evidence. N.C.G.S. § 15-11.1.

5. Criminal Law § 43— photographs of money—admission for illustration

The trial court did not err in admitting photographs of money taken from defendant's person at the time of his arrest for possession of cocaine with intent to sell, since the photographs were used for illustrative purposes.

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6. Narcotics § 3.1 – keeping building for selling narcotics – prior arrests of individuals in building – admissibility of evidence

In a prosecution of defendant for maintaining a building for the purpose of keeping or selling a controlled substance, the trial court did not err in admitting testimony regarding prior arrests of other individuals at the building where defendant was arrested, since the prior drug-related arrests were made within the time period when defendant was paying rent on the building, and evidence of drug activity at the building during that time was relevant to the charge.

7. Narcotics § 4.7 – keeping building for selling narcotics – distinction between felony and misdemeanor – instructions proper

In a prosecution of defendant for maintaining a building for the purpose of keeping or selling a controlled substance, the trial court adequately instructed the jury on the distinction between the misdemeanor charge of "knowingly" maintaining a building in violation of N.C.G.S. § 90-108(a)(7) and the felony charge under N.C.G.S. § 90-108(b) when the violation is "committed intentionally."

APPEAL by defendant from *Stephens (Donald W.), Judge*. Judgment entered 30 September 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 28 September 1988.

Defendant was tried and convicted of (i) possession of more than one gram of cocaine with the intent to sell and (ii) intentionally keeping and maintaining a building used for the purpose of keeping and selling a controlled substance.

The State's evidence tended to show the following. On 4 February 1987 several Winston-Salem police officers, acting pursuant to a search warrant, entered premises located at 517 West 17th Street. In one room of the building which contained a bar, the officers found twenty glassine envelopes lying on top of the bar. Subsequent tests of the contents of five of the envelopes revealed that they contained cocaine.

When the police arrived, approximately fifteen people were on the premises. Four or five people, one of whom was defendant, were in the room where the drugs were found. The police found a key ring in the building which defendant identified as his own, and one of the keys on the ring fit a padlock on the front door of the building. The police also searched defendant's person, and seized large rolls of currency totalling \$10,638.00 and a rent receipt for the premises dated 3 February 1987.

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The premises were rented in the name of Hattie Perry, which was the name appearing on the receipt. The same name appeared on phone and power bills found on the premises. The owner of the building testified that he had never met a Hattie Perry, that the building had been leased under that name for eight to ten months, and that defendant had paid the rent for the month of February and on four or five previous occasions. The only Hattie Perry the police were able to locate had lived in Charlotte and died in September 1985. An employee of a State agency testified that defendant gave 517 West 17th Street as his home address in October 1986.

Defendant presented no evidence. The offenses were consolidated for the purpose of judgment and, from a judgment imposing a ten-year prison term, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John R. Corne, for the State.

Larry F. Habegger for defendant-appellant.

PARKER, Judge.

Defendant brings forward seven assignments of error. Defendant's first two assignments of error are that the trial court erred in denying his motions to dismiss both charges against him for insufficient evidence. Defendant's next two assignments of error are that the trial court erred in admitting into evidence testimony concerning money seized from defendant's person and photographs used to illustrate this testimony. Defendant also assigns error to the trial court's admission of testimony regarding prior arrests of others made at the location of defendant's arrest and evidence that the search warrant indicated that there was drug traffic at the premises. Defendant's final assignment of error is directed to the trial court's charge to the jury on the offense of intentionally maintaining a building for the purpose of keeping and selling a controlled substance.

Defendant first contends that the trial court erred in denying his motion to dismiss the charge of possession of cocaine with the intent to sell. In order to withstand defendant's motion, the State was required to present substantial evidence that defendant (i) had either actual or constructive possession of the cocaine and (ii)

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possessed the cocaine with the intent to sell. *State v. Williams*, 307 N.C. 452, 455, 298 S.E. 2d 372, 374 (1983). In determining whether there is substantial evidence of each element of the offense, the evidence is viewed in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from the evidence. *Id.* at 454-55, 298 S.E. 2d at 374. Defendant contends that the State failed to present substantial evidence of either his possession of the cocaine or his intent to sell.

[1] Because defendant was not in actual possession of the cocaine, he could only be convicted under the theory of constructive possession. Where controlled substances are found on premises under the defendant's control, this fact alone may be sufficient to give rise to an inference of constructive possession and take the case to the jury. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972). Where, however, the defendant's possession of the premises is nonexclusive, constructive possession may not be inferred in the absence of other incriminating circumstances. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E. 2d 636, 638 (1987).

In the present case, although defendant exercised some control of the premises, his control was not exclusive. There were several other people in the building at the time of defendant's arrest and the owner of the building testified that the rent had been paid at times by people other than defendant. In addition, there was some evidence that another individual had been living in the building.

The evidence, however, suggests incriminating circumstances, other than defendant's control of the premises, sufficient to permit the jury to infer constructive possession. Defendant was arrested in the same room where the police found the cocaine in plain view. A defendant's presence on the premises and in close proximity to a controlled substance is a circumstance which may support an inference of constructive possession. See *State v. Leonard*, 87 N.C. App. 448, 456, 361 S.E. 2d 397, 402 (1987), *disc. rev. denied and appeal dismissed*, 321 N.C. 746, 366 S.E. 2d 867 (1988); *State v. Rich*, 87 N.C. App. 380, 383, 361 S.E. 2d 321, 323 (1987). Although the effect of this circumstance is somewhat mitigated by the fact that others were present in the room, the large amount of cash found on defendant's person is an additional incriminating circumstance. See *State v. Brown*, 310 N.C. 563, 569,

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313 S.E. 2d 585, 589 (1984). These circumstances, coupled with defendant's nonexclusive control of the premises, were sufficient to allow the jury to infer that defendant had constructive possession of the cocaine.

[2] Defendant also contends that the State failed to present substantial evidence of his intent to sell. Defendant argues that the amount of cocaine found on the premises was not sufficient to support a finding of intent to sell. State's evidence showed that there was, at the most, 4.27 grams of cocaine contained in the envelopes found in the building. The cocaine was packaged, however, in twenty separate envelopes. Even where the amount of a controlled substance is small, the method of packaging is evidence from which the jury may infer an intent to sell. See *State v. Williams*, 71 N.C. App. 136, 139-40, 321 S.E. 2d 561, 564 (1984). The cash found on defendant's person also supports such an inference. Therefore, the trial court did not err in denying defendant's motion to dismiss the charge of possession with intent to sell.

[3] Defendant next contends that there was insufficient evidence to support his conviction under G.S. 90-108(a)(7), (b) for intentionally maintaining a building for the purpose of keeping and selling a controlled substance. Defendant relies on *State v. Rich*, *supra*, in which this Court upheld a conviction under G.S. 90-108(a)(7) on the grounds that the defendant resided in the house where the drugs were found. *Rich*, 87 N.C. App. at 384, 361 S.E. 2d at 324. Defendant argues that there is not sufficient evidence to show that he actually resided at the building.

Defendant's argument is without merit. General Statute 90-108(a)(7) does not require residence, but permits conviction if a defendant merely keeps or maintains a building for the purpose of keeping or selling controlled substances. Defendant's payment of rent and possession of the key to the padlock support the inference that he maintained the building, and the evidence that defendant did not actually reside there permits the inference that he maintained it for an illegal purpose. Prior to defendant's arrest, police observed numerous people stopping at the building for short times and then leaving. These facts, together with the circumstances supporting defendant's conviction on the possession charge, are clearly sufficient to sustain a conviction under G.S. 90-108(a)(7), (b). Defendant's first two assignments of error are overruled.

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[4] Defendant's next two assignments of error concern the admission of testimony regarding the money seized from defendant's person and the State's use of photographs to illustrate that testimony. The money itself was not produced at trial. The record shows that a Forsyth County District Court Judge, after a probable cause hearing on the charges against defendant, ordered that the money be returned, but the order had not been complied with at the time of trial. Counsel for the State advised the trial court that the money was in the possession of the federal government.

Defendant first contends that the State's failure to comply with the order directing the return of the money should preclude it from presenting other evidence of the money's existence. The District Court's order is not, however, the subject of this appeal and the record is not sufficient to enable us to rule on the issue of the State's compliance with the order. In any event, the State's failure to comply with such an order would not require the trial court to exclude testimony that is otherwise admissible. General Statute 15-11.1 authorizes the introduction of photographs or other identification of seized property so long as the substitute evidence "is not likely to substantially prejudice the rights of the defendant . . ." Defendant has not shown how he was prejudiced and, if he wished to obtain the money for the purpose of preparing his defense, he should have utilized pretrial discovery procedures. *See G.S. Chap. 15A, Art. 48.*

Defendant next argues that the State's failure to produce the money violated his constitutional right to confront the witnesses against him as guaranteed by the sixth amendment to the United States Constitution and article I, section 23 of the North Carolina Constitution. These constitutional provisions, however, only pertain to witnesses. Defendant does not cite, and we are unaware of any authority which has applied the constitutional right of confrontation to physical evidence. Defendant was afforded the opportunity to cross-examine the officers who testified regarding the money and to present evidence on his own behalf. Thus, no violation of his constitutional rights occurred.

[5] Defendant also contends that the trial court erred in admitting photographs of the money and other items because the State failed to produce the actual items at trial. The photographs were taken at the time of defendant's arrest. They depict the defend-

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ant and several items on a table, some of which were seized from defendant's person. The trial court admitted the photographs for illustrative purposes only. Defendant argues that the photographs were substantive evidence because they depicted items that were not produced at trial. He further argues that they should have been excluded because a proper foundation was not laid for their admission.

A review of the transcript shows that the photographs were used by one of the arresting officers to illustrate his testimony concerning the items that were seized from defendant's person. Although other items were included in the photographs, the officer identified those that were taken from defendant. The officer clearly indicated that the photographs accurately portrayed what he had observed. Thus, the photographs were properly authenticated for illustrative purposes. *See State v. Atkinson*, 275 N.C. 288, 311, 167 S.E. 2d 241, 255 (1969), *death sentence vacated*, 403 U.S. 948, 91 S.Ct. 2283, 29 L.Ed. 2d 859 (1971).

General Statute 8-97, which authorizes the introduction of photographs as substantive evidence upon the laying of a proper foundation, provides: "This section does not prohibit a party from introducing a photograph . . . solely for the purpose of illustrating the testimony of a witness." The trial judge in this case stated that the photographs were received for illustrative purposes only. Although the trial judge did not give a limiting instruction, none was requested by defendant. The failure to give such an instruction is not reversible error in the absence of a request made at the time the photographs are received into evidence. *State v. Kuplen*, 316 N.C. 387, 417-18, 343 S.E. 2d 793, 809-10 (1986). Accordingly, we find no error in the trial court's admission of the photographs.

[6] Defendant next assigns error to the trial court's admission of testimony regarding prior arrests of other individuals at the building where defendant was arrested. Defendant contends that evidence of the prior arrests, which were drug-related, should have been excluded on the grounds that it is irrelevant to the charges against him. We disagree. The testimony in question shows that the arrests were made in December 1986, which is within the time period when defendant was paying rent on the building. Evidence of drug activity at the building during this

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time is relevant to the charge of maintaining a building for the purpose of keeping or selling a controlled substance. The assignment of error is overruled.

Defendant also assigns error to the trial court's admission of an officer's testimony as to information contained in the search warrant. The assignment of error is based on the following exchange:

Q. Had you had prior information contained in the search warrant which indicated to you that there was some drug traffic at that location?

A. Yes, I did.

Q. What information did you have?

MR. HABEGGER: Objection.

THE COURT: Sustained.

Defendant failed to object to the first question and answer, and his objection to the second question was ineffective to challenge the first. Defendant's failure to make a timely objection or a motion to strike precludes him from assigning error to the trial court's admission of the testimony. *State v. Burgess*, 55 N.C. App. 443, 447, 285 S.E. 2d 868, 871 (1982); Rule 103(a)(1), N.C. Rules Evid.

[7] Defendant's final assignment of error is that the trial court did not adequately instruct the jury on the distinction between the misdemeanor charge of "knowingly" maintaining a building in violation of G.S. 90-108(a)(7) and the felony charge under G.S. 90-108(b) when the violation is "committed intentionally." This Court has made the following distinction with regard to misdemeanor and felony charges under G.S. 90-108:

A person knows of an activity if he is aware of a high probability of its existence. See Black's Law Dictionary (5th ed. 1979). A person acts intentionally if he desires to cause the consequences of his act or that [sic] he believes the consequences are substantially certain to result. *Id.*

State v. Bright, 78 N.C. App. 239, 243, 337 S.E. 2d 87, 89 (1985), *disc. rev. denied*, 315 N.C. 591, 341 S.E. 2d 31 (1986).

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In the present case, the trial court instructed the jury on the elements of the misdemeanor and felony charges, and distinguished "knowingly" and "intentionally" as follows:

Ladies and gentlemen, I have used the term[s], knowingly and intentionally. I instruct you that one could act knowingly by permitting or allowing something to occur without personally intending that it occur.

The trial court's charge, although somewhat terse, conveys the gist of the distinction enunciated in *State v. Bright, supra*. Furthermore, the record reveals that defendant failed to object to the charge as given; therefore, he has waived his right to assign error to the charge. Rule 10(b)(2), N.C. Rules App. Proc.

For the foregoing reasons, we hold that defendant's trial was free of reversible error.

No error.

Judges PHILLIPS and EAGLES concur.

BROOKS DISTRIBUTING COMPANY, INC., PLAINTIFF v. JEFFREY PUGH,
DEFENDANT

BROOKS DISTRIBUTING COMPANY, INC., PLAINTIFF v. HOWARD HELTON,
DEFENDANT

No. 8814SC178

(Filed 1 November 1988)

1. Rules of Civil Procedure § 12.1— consideration of contract by trial court— motion to dismiss not treated as summary judgment

A motion for dismissal for failure to state a claim pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) should not be treated as a motion for summary judgment pursuant to Rule 56 though the trial court considers the contract which is the subject matter of the action, since such consideration does not expand the scope of the hearing and should not create justifiable surprise in the nonmoving party.

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2. Master and Servant § 11.1— covenant not to compete—no consideration—covenant invalid as matter of law

Since one defendant's covenant not to compete was governed by the statute of frauds and the written covenant, which was entered into seven years after his original employment, lacked an essential element, a statement of any kind of consideration, the covenant was invalid as a matter of law, and the trial court properly dismissed as to that defendant. N.C.G.S. § 75-4.

3. Master and Servant § 11.1— covenant not to compete—contract not facially invalid for lack of consideration

A non-competition agreement entered into by plaintiff employer and defendant employee at the beginning of defendant's employment and specifically referred to in defendant's employment contract was not facially invalid for lack of consideration, and the trial court therefore erred in dismissing plaintiff's complaint for failure to state a claim.

Judge COZORT dissenting in part.

APPEAL by plaintiff from *Bailey, Judge*. Order filed 22 September 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 30 August 1988.

Two civil actions were instituted 6 March 1986 by plaintiff-appellant Brooks Distributing Company to enforce covenants not to compete against two former employees, defendant-appellees Jeffrey A. Pugh and Howard Helton.

Maxwell, Martin, Freeman and Beason, P.A., by James B. Maxwell and John C. Martin, for plaintiff-appellant.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr. and E. Elizabeth Lefler, for defendant-appellees.

JOHNSON, Judge.

Plaintiff instituted this civil action seeking the enforcement of two noncompetition agreements, injunctive relief, and compensatory and punitive damages. Each defendant answered the complaint contending, *inter alia*, that their noncompetition agreements were invalid because they were not supported by consideration, and were unreasonable as to time and territory. Defendants also counterclaimed for damage to their businesses claiming violations of G.S. sec. 75-1.1, alleging interference with contract. Further, they moved for dismissal under G.S. sec. 1A-1, Rule 12(b)(6).

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Upon motion of the defendants, the trial court consolidated the actions for trial, and on 22 September 1987, the defendants' motion to dismiss was granted. From this order plaintiff appeals.

Plaintiff, Brooks Distributing Company [hereinafter Brooks], is a North Carolina corporation engaged in the business of distributing automotive additives and chemicals. Defendants Pugh and Helton were both formerly employed by plaintiff as sub-distributors.

Defendant Pugh contracted with plaintiff on 31 March 1980 to serve as its sub-distributor in five counties in North Carolina. On that same day Brooks and defendant Pugh also signed a separate "Non-Competition Agreement" to which the sub-distributorship contract specifically referred. This agreement prohibited defendant Pugh from competing with plaintiff in the sale of automotive additives and chemicals for a period of two years throughout the State of North Carolina. Plaintiff alleges that defendant Pugh's association with plaintiff was terminated on 3 November 1985, and that Pugh thereafter breached his "Non-Competition Agreement" by taking employment with a competitor and selling to one or more customers he had originally contacted for Brooks.

Howard Helton's situation is somewhat different. He worked as a sub-distributor from 1975 to 1985, but only signed his "Non-Competition Agreement" (a document substantially identical to the one signed by defendant Pugh) on 29 March 1982, after seven years' employment with plaintiff. Plaintiff alleges that defendant Helton, after terminating his association with Brooks on 25 November 1985, breached his 1982 agreement by taking employment with a competitor and selling to one or more former customers.

[1] Before reaching the merits of this appeal, we address the issue of whether the trial court was procedurally correct in disposing of this action under G.S. sec. 1A-1, Rule 12(b)(6). Plaintiff contends that the trial court's consideration of each defendant's "Non-Competition Agreement" and defendant Pugh's employment agreement presented by defendants at pre-trial conference effectively converted the dismissal order into one for summary judgment pursuant to G.S. sec. 1A-1, Rule 56.

If a party moves to dismiss for failure to state a claim upon which relief can be granted under G.S. sec. 1A-1, Rule 12(b)(6), and

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the court considers matters outside the pleadings in ruling on the motion, Rule 12(b) provides that the motion "shall be treated as one for summary judgment . . . and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." This Court has stated that the purpose of this provision is to avoid unfair surprise to the nonmoving party if extraneous materials are presented on a 12(b)(6) motion, and to allow that party reasonable time to produce materials to rebut. *Coley v. Bank*, 41 N.C. App. 121, 254 S.E. 2d 217 (1979). However, this Court in *Coley* has further stated that a trial court's consideration of a contract which is the subject matter of the action does not expand the scope of the hearing and should not create justifiable surprise in the nonmoving party. Since no prejudice results to the nonmoving party, dismissal may be properly had under Rule 12(b)(6). *Id.* at 126, 254 S.E. 2d at 220.

The case *sub judice* falls squarely under the rule of *Coley*, and therefore the trial court was procedurally correct in dismissing under Rule 12(b)(6).

In reviewing the dismissal granted defendants Pugh and Helton under G.S. sec. 1A-1, Rule 12(b)(6), we first note that the "question for the court [on a motion to dismiss] is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted . . ." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E. 2d 838, 840 (1987) (citation omitted). Further, in ruling on a motion to dismiss, a court may properly consider documents which are the subject of a plaintiff's complaint and to which his complaint specifically refers even though they are presented by the defendant. *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E. 2d 672 (1988), *citing Coley, supra*. Therefore, in the case *sub judice*, the trial court properly considered the two covenants and defendant Pugh's employment agreement in ruling on the motion. On appeal, plaintiff must demonstrate that the "Non-Competition Agreements" in question are not void and unenforceable as a matter of law.

Contracts in restraint of trade are illegal under G.S. sec. 75-1. See also G.S. sec. 75-2 and G.S. sec. 75-4. However, North Carolina courts will in equity find a covenant not to compete valid and enforceable if it is:

1. In writing.

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2. Made part of a contract of employment.
3. Based on reasonable consideration.
4. Reasonable both as to time and territory.
5. Not against public policy.

A.E.P. Industries v. McClure, 308 N.C. 393, 402-03, 302 S.E. 2d 754, 760 (1983) (citations omitted).

[2] In applying these standards to the covenants *sub judice*, we deem it appropriate to consider first the agreement entered into by plaintiff and defendant Helton. Defendant Helton contends his "Non-Competition Agreement" is void and unenforceable because it was not entered into as part of his contract of employment, and because it lacked consideration.

It is well established in North Carolina that "the promise of new employment is valuable consideration and will support an otherwise valid covenant not to compete contained in the initial employment contract." *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 273, 210 S.E. 2d 427, 429 (1974) (citations omitted), *cert. denied*, 286 N.C. 421, 211 S.E. 2d 802 (1975). However, if an employment relationship already exists without a covenant not to compete, any such future covenant must be based upon new consideration. *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E. 2d 166 (1964); *Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543 (1944); *Associates, Inc. v. Taylor*, 29 N.C. App. 679, 225 S.E. 2d 602 (1976).

Plaintiff admits in its complaint that defendant Helton was employed by plaintiff for seven years before he signed his "Non-Competition Agreement." Defendant Helton received no promotion in exchange for signing the restrictive covenant, plaintiff's complaint stating that defendant Helton remained a sub-distributor until his termination in 1985. Also, defendant Helton's 1982 agreement makes no mention of any consideration whatsoever.

The requirement and sufficiency of a writing needed to limit a person's right to do business in North Carolina is governed by G.S. sec. 75-4. This Court has noted that G.S. sec. 75-4 is one of our "statute of frauds" provisions covering various types of contracts. "G.S. [sec.] 75-4 is consistent with the other 'statute of frauds' provisions in our law which require only that the writing be 'signed by the party charged therewith . . .'" *Manpower, Inc.*

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v. Hedgecock, 42 N.C. App. 515, 519-20, 257 S.E. 2d 109, 113 (1979) (emphasis added).

Since the covenant in question is governed by a statute of frauds provision, namely, G.S. sec. 75-4, we believe that all the essential elements of the contract should be reduced to writing, as they are in certain other types of contracts subject to other statute of frauds provisions. For example, a contract for the sale of land or a lease which falls under the applicable statute of frauds must contain all essential terms, including the purchase price or rental price, respectively. *Fuller v. Southland Corp.*, 57 N.C. App. 1, 290 S.E. 2d 754, *disc. rev. denied*, 306 N.C. 556, 294 S.E. 2d 223 (1982); *Hurdle v. White*, 34 N.C. App. 644, 239 S.E. 2d 589 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

The following is a brief statement of the history of stating consideration in a contract governed by the statute of frauds and a present view on the subject:

Section 4 of the historic English statute of frauds, which provides that no action shall be brought on certain contracts unless the agreement or some memorandum or note thereof shall be in writing . . . does not expressly require the consideration to be expressly stated in the memorandum. Long after the statute became law, and after various conflicting decisions, it was decided in England that the memorandum must state the consideration, or at least a consideration, for the promise of the defendant. The same view has been taken in many jurisdictions in this country, . . . The view is that much of the mischief which it was the object of the statute of frauds to prevent would be let in if it were competent for a party to a contract to prove the consideration by evidence not in writing. Accordingly, parol evidence is held inadmissible to show a consideration where there is not a statement of the consideration in the memorandum. However, a memorandum is not to be deemed insufficient merely because extrinsic evidence may be required to explain the statement of consideration made therein.

72 Am. Jur. 2d, *Statute of Frauds*, sec. 344 (1974).

Plaintiff argues that Helton's noncompetition agreement did not establish, as a matter of law, that no new consideration was

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provided in return for his agreement not to compete. Plaintiff overlooks the fact that the agreement, (1) is not internally related to some other writing from which the necessary contract provisions can be determined, and (2) does not contain any statement of obligation flowing from the employer to the employee. Plaintiff also ignores the fact that the agreement contains no reference to consideration whatsoever. Accordingly, evidence to show consideration where there is not a statement of consideration is inadmissible.

We believe our position is also in line with this Court's holdings in *Radio, Inc. v. Brogan*, 12 N.C. App. 172, 182 S.E. 2d 594 (1971), and *Radio, Inc. v. Florist*, 12 N.C. App. 173, 182 S.E. 2d 595 (1971). In each case, plaintiff alleged a breach of its contract with defendant, attached the contract to its complaint, and incorporated it by reference. The contract was the only basis upon which plaintiff alleged a right of recovery. This Court affirmed the trial court's dismissal for failure to state a claim upon which relief may be granted on the grounds that the contract did not specify any type of performance by plaintiff. The Court noted that "[i]f defendant had undertaken to sue plaintiff upon this document, he could not show by it what plaintiff's performance was to be, . . . when plaintiff was to begin performance, . . . [or] how long plaintiff was to perform. In short the document does not specify a consideration moving from plaintiff to defendant." *Brogan* at 173, 182 S.E. 2d at 595.

Likewise, in the case *sub judice*, plaintiff's complaint bases recovery solely on defendant Helton's noncompetition agreement dated 29 March 1982. Also, as in the *Brogan* case, the covenant before us states no consideration running from plaintiff to defendant. We believe the covenant defendant Helton signed is not a valid contract because no definite agreement can be ascertained from it. See 3 Strong's, *Contracts*, sec. 3 (1976).

The Court in *Brogan* also stated that it would be governed by the particular provisions of the contract attached by plaintiff to its complaint rather than the conclusions alleged by plaintiff. Although, in the case at bar, the covenant was introduced by defendant rather than plaintiff, we agree that its provisions, rather than the conclusions alleged by plaintiff, should control. Therefore, Brooks' allegation that the covenant was based on

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"good and adequate consideration" does not supersede the language of the covenant itself.

Since defendant Helton's 1982 covenant not to compete lacked an essential element, a statement of any kind of consideration, we hold that it is invalid as a matter of law. Therefore, we affirm the trial court's dismissal as to defendant Helton.

[3] We turn now to the "Non-Competition Agreement" entered into by plaintiff and defendant Pugh. Although we express no opinion as to whether this covenant should ultimately be held to be valid and enforceable by the trial court, we do not find on the face of the pleadings some insurmountable bar to recovery. Unlike defendant Helton's covenant, the Pugh covenant was entered into at the beginning of Pugh's employment with Brooks and is specifically referred to in his employment contract. G.S. sec. 75-4 does not require that a non-competition agreement be set out in a single instrument. A memorandum is sufficient if the necessary contract provisions can be determined from separate but internally related writings. 6 Strong's, *Statute of Frauds* sec. 2 (1977). Therefore, defendant Pugh's covenant is not facially invalid for lack of consideration.

In short, plaintiff has made sufficient allegations at this stage to state a cause of action against defendant Pugh. We therefore hold that dismissal as to defendant Pugh was error by the trial court.

Affirmed in part, and reversed in part.

Judge PARKER concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT dissenting in part.

I concur with that portion of the majority opinion reversing the trial court's dismissal of the action as to defendant Pugh. As to the portion affirming the dismissal of the action against defendant Helton, I dissent. I believe the trial court erred in granting defendant Helton's motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure.

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The majority opinion states that plaintiff's complaint against defendant Helton failed to state a claim because the contract upon which plaintiff's claim was based "lacked an essential element, a statement of any kind of consideration . . . [and] is invalid as a matter of law." (Emphasis added.) In support of its holding, the majority relies on the view expressed in the second edition of *American Jurisprudence* that the statute of frauds requires that the consideration be in writing, and that evidence extrinsic to the written agreement is inadmissible to show a consideration when there is not a statement of consideration in the agreement or memorandum evidencing the agreement. *See* 72 Am. Jur. 2d *Statute of Frauds* § 344 (1974). I do not believe that view is a correct statement of the law of this State.

It is without doubt that a contract to be enforceable must be supported by consideration. *See Restatement of Contracts* § 71 (1979). Our courts have long recognized the requirement of consideration in employment contracts containing covenants not to compete. *See, e.g., Exterminating Co. v. Griffin and Exterminating Co. v. Jones*, 258 N.C. 179, 128 S.E. 2d 139 (1962); *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E. 2d 166 (1964); and *Wilmar, Inc. v. Liles and Wilmar, Inc. v. Polk*, 13 N.C. App. 71, 185 S.E. 2d 278 (1971), cert. denied, 280 N.C. 305, 186 S.E. 2d 178 (1972). For a situation like the instant case, where the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete "must be in the nature of a new contract based upon a new consideration." *Greene Co. v. Kelley*, 261 N.C. at 168, 134 S.E. 2d at 167.

In the case below, plaintiff filed a complaint alleging "[t]hat for good and adequate consideration, and as part of the employment of the Defendant by the Plaintiff, the Defendant signed a non-competition agreement . . ." Plaintiff's complaint alleges consideration. When considering the complaint under Rule 12(b)(6) of the Rules of Civil Procedure, the court must treat the allegations of the complaint as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). Thus, we must assume that the defendant's promise was supported by consideration. It is inappropriate to consider, for purposes of a motion under 12(b)(6), whether the contract fails to comport with the statute of frauds, because the defense that the statute of frauds bars enforcement of a contract is an affirmative defense that "can only be raised by answer or

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reply." *Weant v. McCanless*, 235 N.C. 384, 386, 70 S.E. 2d 196, 198 (1952); Rule 8(c), N.C. Rules Civ. Proc. The majority has resolved an issue not before the trial court on the motion to dismiss under Rule 12(b)(6). I also note that defendant's answer fails to raise the statute of frauds as a defense and does not deny the contract.

In any event, assuming the statute of frauds question was before the trial court and needs to be resolved here, I do not believe that § 75-4 of our General Statutes requires that the consideration given in return for a covenant not to compete must be in writing.

The majority rule among jurisdictions appears to be that a contract within the statute of frauds must, in order to satisfy that statute, include a statement of the consideration for the promise of the defendant. See 72 Am. Jur. 2d § 344 (1972). This rule mirrors the English rule set forth in *Wain v. Warlters*, 5 East 10, 102 Eng. Reprint 972 (1804), which construed the British Statute of Frauds, 29 Charles II., with respect to a promise to pay the debt of another. North Carolina, however, follows what may be termed the minority position. See Annot., 23 A.L.R. 2d 164 (1952).

In *Miller v. Irvine*, 18 N.C. (1 Dev. & Bat. Law) 103 (1834), Chief Justice Ruffin of our Supreme Court considered the authority of *Wain v. Warlters* and decided that the Court was free to exercise its own judgment on the question of whether the writing must express the consideration. The court then rejected the English rule, reasoning that the statute of frauds does not require the consideration to be memorialized in a writing for the same reason that the statute requires the signature only of the party charged with making the promise: "[I]f one only is to be charged on [the contract], there seems to be no reason why it should contain any matter but such as charges him; that is, such stipulations as are to be performed on his part." *Id.* at 104. Therefore, the court concluded:

[T]he statute does not extend to the consideration at all, but that the fraud and perjury provided against, is that which charges the defendant to do what he never contracted to do.

Id. at 108.

The North Carolina rule has been applied in actions to enforce the sale or conveyance of real property, see, e.g., *Miller v.*

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Irvine, 18 N.C. (1 Dev. & Bat. Law) 103 (1834) and *Lewis v. Murray*, 177 N.C. 17, 97 S.E. 750 (1919), and in cases involving promises to answer for the debt of another. See *Green v. Thornton*, 49 N.C. (Jones) 230 (1856); *Supply Co. v. Person*, 154 N.C. 456, 70 S.E. 745 (1911). The statute of frauds applicable to those cases requires no more or less than the statute of frauds applicable to contracts limiting a person's right to do business in this State, that is, that the contract or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith. See N.C. Gen. Stat. §§ 22-1, 22-2, 75-4 (1987).

Radio, Inc. v. Brogan, 12 N.C. App. 172, 182 S.E. 2d 594 (1972), and *Radio, Inc. v. Florist*, 12 N.C. App. 173, 182 S.E. 2d 595 (1972), cited by the majority, do not purport to address a statute of frauds question, and do not control the case before us.

This is to say only that the contract satisfies the statute of frauds contained in § 75-4; the agreement will nevertheless be invalid if there is no legally sufficient consideration. Plaintiff should be permitted to offer extrinsic evidence, written or parol, of the consideration for defendant Helton's covenant. If it cannot offer such evidence, the trial court should, on proper motion, grant summary judgment for defendant Helton under Rule 56 of the N.C. Rules of Civil Procedure. It was error, however, to grant defendant Helton's motion to dismiss for failure to state a claim. For these reasons, I respectfully dissent.

KATHY F. CORWIN, ADMINISTRATRIX CTA OF THE ESTATE OF JANET M. DICKEY
AND MELISSA LEIGH MCCRIMMON BY AND THROUGH HER GUARDIAN AD
LITEM, MICHAEL MCCRIMMON v. THOMAS J. DICKEY

No. 8830SC247

(Filed 1 November 1988)

Trial § 11.1— automobile negligence action—jury argument as to religious values and legal profession improper

A personal assault on plaintiffs, calculated to interject religious values and criticism of the legal profession into an automobile negligence action, was in no way supported by the evidence and constituted an abuse of counsel's privilege to argue his case which entitled plaintiffs to a new trial.

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APPEAL by plaintiffs from *Ferrell, Judge*. Judgment entered 22 May 1987 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 31 August 1988.

These are two civil actions commenced 28 September 1983 which both allege that defendant Thomas J. Dickey was grossly negligent in the operation of his automobile on 11 October 1981, thereby causing an accident which injured plaintiffs. The first is a wrongful death action brought by the estate of Janet M. Dickey, defendant's wife, who was a passenger in the vehicle driven by defendant. The second action, brought on behalf of minor plaintiff Melissa Leigh McCrimmon, daughter of deceased Janet Dickey by her former marriage, is for injuries she sustained while also a passenger in defendant's automobile.

Alley, Hyler, Killian, Kertsen, Davis and Smathers, by Robert J. Lopez and George B. Hyler, Jr., for plaintiff-appellants.

Robert G. McClure, Jr., and Frank J. Contrivo for defendant-appellee.

JOHNSON, Judge.

On 10 October 1981, defendant Thomas J. Dickey, his wife Janet Dickey, now deceased, and Mrs. Dickey's daughter, Melissa McCrimmon, spent the night at the Maggie Valley Inn and Country Club in Haywood County, North Carolina. The next morning, a Sunday, defendant Dickey drove the three of them to a church service at the top of Lord's Mountain, also in Haywood County. The last part of the trip was a five to ten minute drive up a gravel road which leads to the top of Lord's Mountain.

After the church service the three had dinner near the top of the mountain with individuals they met there. Then, at about 3:00 p.m., defendant Dickey began driving his wife and stepdaughter down the narrow mountain road to return to their hotel. He passed two cars coming towards him on a steep grade and then followed a curve in the road. About three to six car lengths past the curve, defendant saw what he described as a truck parked on the left side of the road, making defendant's portion of the road very narrow. To the right of the road were vegetation and a steep embankment. Defendant proceeded and after passing the truck, his right wheels slipped off the roadway and he lost trac-

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tion. Defendant gave the car gas in an unsuccessful attempt to cut the wheels back onto the road. The car hung for a moment on the side of the road, then tumbled down the embankment about 125 feet and landed on its wheels.

Janet Dickey was thrown from the vehicle and subsequently died from injuries she sustained in the accident. Melissa McCrimmon and defendant Dickey both sustained physical injuries.

Plaintiffs filed their original complaint on 28 September 1983 alleging negligence by defendant and also issued a summons on that date. On 31 October 1983, plaintiffs, pursuant to G.S. sec. 1A-1, Rule 15(a), amended their complaint to add as an additional defendant the North Carolina Department of Transportation, alleging negligence by the Department in the construction and maintenance of the road on which the accident in question occurred. On 7 November 1983, the Department of Transportation moved to dismiss pursuant to G.S. sec. 1A-1, Rules 12(b)(1) and 12(b)(2). This motion was granted. Defendant Dickey answered on 14 November 1983, denying negligence.

On 10 July 1985, plaintiffs moved to amend their complaint pursuant to G.S. sec. 1A-1, Rule 15(a). The purposes of this motion were to delete the Department of Transportation as a party, to allege gross negligence against defendant Dickey, and to request punitive damages from him in addition to compensatory damages. The court granted leave to amend on 9 September 1985, and on 13 September 1985 defendant Dickey filed his amended answer.

A jury trial of this action commenced on 20 May 1987. The jury was presented with two liability issues: (1) "Did Janet M. Dickey, deceased, die as a result of the negligence of the Defendant, Thomas J. Dickey?", and (2) "Was the Plaintiff, Melissa Leigh McCrimmon, injured or damaged by the negligence of the Defendant, Thomas J. Dickey?" The jury answered both questions in the negative, and plaintiffs recovered nothing.

On 1 June 1987, plaintiffs moved for a new trial, pursuant to G.S. sec. 1A-1, Rule 59 on the grounds that: (1) the verdict was contrary to the weight of the evidence; (2) defense counsel's misconduct during the closing argument prejudiced the jury and prevented plaintiff from having a fair trial; (3) newly discovered evidence became available after trial; and (4) errors in

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law, to which plaintiff objected, occurred at the trial. The trial court denied plaintiffs' motion for a new trial, and plaintiffs here appeal that denial.

By their first Assignment of Error, plaintiffs contend that statements made by defense counsel during closing argument prejudiced the jury against them and prevented plaintiffs from having a fair trial. Although closing arguments were not recorded at trial, certain statements of defense counsel were reconstructed during settlement of the record on appeal to reflect substantially statements made at trial:

- (i) Any money that you will award will go to the lawyers; this is a lawyers case, money, money, money! The lawyers brought this case, it is for their benefit. All I see is their financial benefit. What is the world coming to? It is all for money.
- (ii) Is it Christian to sue for money? Is it Christian for a step-daughter to sue her stepfather who was going to take care of her? It's as unchristian as Jim and Tammy Bakker.
- (iii) Defense counsel pointed to the 10 commandments and said: Suits like this should not be brought.
- (iv) There will be a reckoning on Judgment Day for persons who are greedy and how will these people defend this.

Plaintiffs objected to these statements and the trial court sustained the objections.

We are mindful, as defendant points out, that an attorney has wide latitude in arguing his case to the jury. *Pence v. Pence*, 8 N.C. App. 484, 174 S.E. 2d 860 (1970) (citation omitted). Further, in North Carolina it is well-established that comment of counsel is ordinarily left to the sound discretion of the trial judge, and that the reviewing court will reverse his decision (that counsel's statements were not grounds for a new trial) only when it is clear that counsel's impropriety was gross and well calculated to prejudice the jury. *Lamborn v. Hollingsworth*, 195 N.C. 350, 353, 142 S.E. 19 (1928). We believe this is just such a case. We are limited here to dealing with an incomplete record of defense counsel's argument. Even so, it is apparent that the statements before us were made for the sole purpose of prejudicing the jury's decision

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on the issue before it, namely, whether defendant was negligent, by impugning plaintiffs' characters and motives.

It is true that counsel has the undoubted right to argue every aspect of his case supported by the evidence and all reasonable inferences drawn therefrom. *Pasour v. Pierce*, 76 N.C. App. 364, 333 S.E. 2d 314 (1985). However, this personal assault on plaintiffs, calculated to interject religious values and criticism of the legal profession into an automobile negligence action, is in no way supported by the evidence and constituted an abuse of counsel's privilege to argue his case. Counsel has no privilege to humiliate and degrade plaintiffs in the eyes of the jury. *Coble v. Coble*, 79 N.C. 589 (1878).

Our Supreme Court has stated that the standard of review when a new trial is either granted or denied pursuant to G.S. sec. 1A-1, Rule 59 is whether the trial court committed an abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). Although we recognize the stringency of this standard, we believe that because of the extremely prejudicial effect of defense counsel's remarks on plaintiffs' case, the able trial judge, in this instance, did abuse his discretion in denying plaintiffs a new trial. Further, we do not believe the trial court's sustaining plaintiffs' objections to those remarks was sufficient to remove the effects of these highly prejudicial statements. The court should have also directed defense counsel to refrain from such statements and clearly admonished the jury to totally disregard them in reaching its decision. See *Wilcox v. Motors Co.*, 269 N.C. 473, 153 S.E. 2d 76 (1967); 88 C.J.S., *Trial*, secs. 200-202.

By Assignments of Error two through seven, plaintiffs contend they were prejudiced by numerous questions asked during trial by defense counsel. Because we are confident that there will not be a recurrence of such questions at the new trial of this action, we decline to specifically review them.

Similarly, we deem it unnecessary to review plaintiffs' assignments of error eight through ten since they are moot questions in light of our holding as to plaintiffs' first assignment of error.

For the aforementioned reasons, we find the trial court erred in denying plaintiffs a new trial, and therefore we vacate the judgment of the trial court and order a

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New trial.

Judges PARKER and COZORT concur.

MORRIS ATKINS AND WIFE, CECILIA ATKINS; WILLIAM A. BANKS; EARL YOUNG AND WIFE, BETTY YOUNG; WILLIAM R. BANKS; AND SHEREEL L. BANKS WATSON, PLAINTIFFS v. FONDREN MITCHELL AND WIFE, MARY ELIZABETH MITCHELL; AND R. LEE SMITH, TRUSTEE, DEFENDANTS

No. 8824SC271

(Filed 1 November 1988)

1. Contracts § 27.2— contract to purchase shares of stock—breach—condition of performance met—summary judgment proper

Plaintiffs were entitled to summary judgment in their action for breach of an agreement to purchase shares of stock from plaintiffs where defendant contended that, because of an "understanding" reached with one plaintiff, defendant's performance was conditioned upon a sale of the corporation or a substantial portion of its assets, but defendant's affidavit showed that at the time of the hearing on plaintiffs' motion, the condition had been met.

2. Corporations § 18; Uniform Commercial Code § 37.7— contract to purchase shares of stock—breach—allegations as to damages sufficient

In plaintiffs' action for breach of an agreement to purchase shares of stock where plaintiffs sought damages of \$1,054,916.80, stating that it "represent[ed] the aggregate contract purchase price," they clearly and sufficiently stated their claim to recover the purchase price under N.C.G.S. § 25-8-107 (1986), and there was no merit to defendant's contention that, because plaintiffs did not specifically cite the statute in their complaint, they were foreclosed from seeking the contract price remedy and could recover only the more traditional measure of the difference between fair market value and unpaid contract price.

3. Corporations § 18; Uniform Commercial Code § 37.7— contract to purchase shares of stock—breach—efforts to resell securities burdensome—readily available market—questions of fact—summary judgment improper

In an action to recover damages for breach of an agreement to purchase shares of stock, a genuine issue of material fact existed regarding whether efforts at reselling the securities would be unduly burdensome or whether there was a readily available market for their resale, and the trial court therefore erred in entering summary judgment for plaintiffs. N.C.G.S. § 25-8-107(2) (1986).

APPEAL by defendant Fondren Mitchell from *Lamm, Charles C., Judge*. Order entered 4 November 1987 in MADISON County

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Superior Court. Heard in the Court of Appeals 26 September 1988.

Plaintiffs brought this action asserting three claims for relief: (1) against defendant Fondren Mitchell for breach of agreements to purchase shares of stock from plaintiffs, (2) to set aside alleged fraudulent property transfers to Mrs. Mitchell, and (3) to set aside alleged fraudulent property transfers to defendant Smith. Following discovery, the trial court granted summary judgment in favor of plaintiffs against defendant Fondren Mitchell in the sum of \$1,054,916.80. The claims against the other two defendants are still pending, awaiting the outcome of this appeal.

Plaintiffs' forecast of evidence before the trial court tended to show that defendant Fondren Mitchell entered into written agreements with plaintiffs wherein he agreed to purchase from plaintiffs a total of 753,512 shares of stock in Bald Mountain Development Corporation at a price of \$1.40 per share, the purchase to be closed no later than 9 September 1985. Defendant failed or refused to purchase the stock. By affidavit of plaintiff Young, plaintiffs asserted that there was no readily available market for the stock and that reasonable efforts to resell the stock for a reasonable price had failed.

In opposition to plaintiffs' motion for summary judgment, defendant filed an affidavit in which he asserted that there was an "understanding" between him and plaintiff William Banks, who represented the other plaintiffs in the negotiations, and that "the sale of the corporation or a substantial portion of its assets was a condition to my obligation to [purchase] the stock." In the same affidavit, defendant related that a substantial portion of the Corporation's assets were sold in 1987.

Bailey and Bailey, by G. D. Bailey and J. Todd Bailey, for plaintiff-appellees.

Adams, Hendon, Carson, Crow & Saenger, P.A., by George W. Saenger, for defendant-appellant Fondren Mitchell.

WELLS, Judge.

Although the trial court's judgment did not dispose of all claims between all parties and did not provide that there was no just reason for delay, N.C. Gen. Stat. § 1A-1, Rule 54(b) of the

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Rules of Civil Procedure, the entry of a money judgment against defendant involves a substantial right under N.C. Gen. Stat. §§ 1-277(a) (1983) and 7A-27(d)(1) (1986) entitling defendant to appeal. See *Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E. 2d 667 (1977); *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92, --- S.E. 2d --- (1980).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) of the Rules of Civil Procedure. Defendant contends that there exist genuine issues of material fact both as to defendant's alleged breach of the agreements and as to plaintiffs' available remedies for a breach.

[1] As to the alleged breach, defendant does not dispute the execution of the agreements or the failure of defendant to perform, but contends that because of the "understanding" reached between defendant and plaintiff Banks, defendant's performance was conditioned upon a sale of Bald Mountain Development Corporation or a substantial portion of its assets. Assuming that defendant was entitled to assert such an oral condition precedent, see *Bailey v. Westmoreland*, 251 N.C. 843, 112 S.E. 2d 517 (1960) and *Van Harris Realty, Inc. v. Coffey*, 41 N.C. App. 112, 254 S.E. 2d 184 (1979), even though defendant did not plead this defense in his answer, see *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976), defendant's affidavit showed that at the time of the hearing on plaintiffs' motion, the condition had been met. We hold that plaintiffs were entitled to partial summary judgment as to defendant's breach.

Defendant also contends that there exist genuine issues of a material fact relating to damages, i.e., plaintiffs' remedies for the breach. Plaintiffs sought to recover and obtained summary judgment for the contract price of the stock, i.e., the price set out in the agreements. Defendant's argument asserts that whether plaintiffs are entitled to the contract price or to the difference between the fair market value of the stock and the contract price is a question of fact. We agree.

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[2] N.C. Gen. Stat. § 25-8-107 (1986) (Uniform Commercial Code) permits, with qualifications to be discussed below, the seller of securities under a contract for sale to recover the purchase price of securities not accepted by the buyer. Defendant initially contends that because plaintiffs did not specifically cite this statute in their complaint, they are foreclosed from seeking the contract price remedy and can recover only the more traditional measure of the difference between fair market value and unpaid contract price. We disagree.

Rule 8(a)(2) of the North Carolina Rules of Civil Procedure requires only that a pleading contain “[a] demand for judgment for the relief to which [the party] deems himself entitled.” This language does not necessitate including the specific statute authorizing a particular measure of damages, nor does § 25-8-107 require by its own terms that it be specifically pleaded. Plaintiffs included a prayer for damages in the amount of \$1,054,916.80, stating that it “represent[ed] the aggregate contract purchase price,” clearly indicating their intention to seek the UCC remedy. We hold this sufficient to state plaintiffs’ claim to recover the purchase price under N.C. Gen. Stat. § 25-8-107 (1986). We reject defendant’s argument.

[3] Finally, defendant contends that a genuine issue of material fact exists regarding whether efforts at reselling the securities would be unduly burdensome or whether there is a readily available market for their resale. N.C. Gen. Stat. § 25-8-107(2) (1986) provides:

- (2) When the buyer fails to pay the price as it comes due under a contract of sale the seller may recover the price
 - (a) of securities accepted by the buyer; and
 - (b) of other securities if efforts at their resale would be unduly burdensome or if there is no readily available market for their resale.

Plaintiffs’ affidavit stated only in conclusory fashion that there was no readily available market for the securities and that reasonable efforts to resell them for a reasonable price had failed. They forecasted no evidence regarding actual efforts in finding a market or a buyer to support this assertion, however, and therefore failed to demonstrate the absence of a material issue of fact.

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The trial court erred in granting plaintiffs' motion for summary judgment on the ground that they were entitled to recover the remedy of N.C. Gen. Stat. § 25-8-107(2) (1986) as a matter of law.

Resolving the questions of whether efforts at resale would be *unduly burdensome* or whether there is a *readily available market for resale* requires weighing facts rather than solely applying legal principles. These determinations are fact-based and do not lend themselves to disposition by summary judgment. "Whether there is a readily available market for resale is a question of fact." W. Hawkland, Uniform Commercial Code Series § 8-107:03 (Callaghan 1987) (*citing Taylor v. Gross*, 264 Md. 711, 288 A. 2d 134 (1972)). Issues of availability of a market and ease of resale must be resolved by a trier of fact.

We hold that while plaintiffs are entitled to partial summary judgment as to defendant's breach, this case must be remanded for further proceedings on the issue of damages.

Affirmed in part, reversed in part and remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

MAY BELL MONTGOMERY, MOTHER AND NEXT OF KIN; BETTY JEAN S. MONTGOMERY, GUARDIAN AD LITEM OF MELVIN MONTGOMERY, DEPENDENT NEPHEW; STEPHANIE HOLIDAY AND KATINA EDWARDS, ALLEGED ADULT CHILDREN AND NEXT OF KIN; AND TOMMY R. CRANK, ADMINISTRATOR OF THE ESTATE OF WILLIE MONTGOMERY, DECEASED EMPLOYEE, PLAINTIFFS v. BRYANT SUPPLY COMPANY, EMPLOYER, AND AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8810IC142

(Filed 1 November 1988)

Master and Servant § 79; Appeal and Error § 7— distribution of wrongful death recovery by Industrial Commission—no right of allegedly illegitimate children to appeal

Where an employee died as a result of a work-related accident caused by the negligence of two third-party tort-feasors, and a wrongful death suit was settled for \$160,000 by a consent judgment directing that the funds be turned over to and distributed by the North Carolina Industrial Commission in accord with the provisions of N.C.G.S. § 97-10.2(f)(1), the allegedly illegitimate adult

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daughters of the employee were not entitled to appeal from the order of the Industrial Commission, since the administrator, rather than appellants, was entitled to receive the balance of funds remaining after the court costs, attorneys' fees, and employer's subrogation interest were paid, and the administrator would therefore be the party aggrieved and entitled to appeal.

APPEAL by plaintiffs Stephanie Holiday and Katina Edwards from the Opinion and Award of the North Carolina Industrial Commission filed 3 November 1987. Heard in the Court of Appeals 29 August 1988.

Wm. Benjamin Smith for plaintiff appellants Stephanie Holiday and Katina Edwards.

Hedrick, Eatman, Gardner & Kincheloe, by John F. Morris and Brian D. Lake, for defendant appellees.

PHILLIPS, Judge.

On 18 January 1985 Willie Montgomery, an employee of Bryant Supply Company under the Workers' Compensation Act, died as a result of a work-related accident caused by the negligence of two third-party tort-feasors. After the Industrial Commission awarded all the death benefits authorized by G.S. 97-38 to the decedent's nephew, Melvin Montgomery, born 7 February 1972, the funds recovered from the third-party tort-feasors in the wrongful death action brought by the administrator were turned over to it, and the appeal questions only the correctness of the order distributing those funds. The facts bearing thereon follow: The award of the death benefits was upon findings that the decedent was unmarried; neither of his surviving adult illegitimate daughters, Katina Edwards and Stephanie Holiday, nor his mother, May Bell Montgomery, was wholly dependent upon him; his nephew, Melvin Montgomery, was actually and wholly dependent upon him at his death. The award requires the defendants to pay to the guardian of Melvin Montgomery \$142.23 a week for a minimum of 400 weeks or until the minor reaches the age of eighteen. The wrongful death suit was settled for \$160,000 by a consent judgment directing that the funds be turned over to and distributed by the North Carolina Industrial Commission in accord with the provisions of G.S. 97-10.2(f)(1). That statute, in substance, provides that funds recovered from a third-party tort-feasor because of the injury or death of an employee covered by

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workers' compensation be turned over to the Industrial Commission and applied in order as follows: First, to the court costs; second, to the fee of the attorney representing the worker or his personal representative; third, to reimbursing the employer for all benefits "paid or to be paid by the employer" under the award; and to pay the amount remaining, if any, "to the employee or his personal representative." The costs of the wrongful death action were paid by the tort-feasors and the order of distribution entered by Deputy Commissioner Beeton, affirmed by the Full Commission, directed that \$57,892, less attorneys' fees, be paid to the employer's workers' compensation carrier in full settlement of its subrogation interest and that the remaining \$102,108, less counsel fees, "be paid the plaintiffs as provided in the consent judgment." Only plaintiffs Katina Edwards and Stephanie Holiday appealed.

The appellants contend, as they did before the Full Commission, that the employer's workers' compensation carrier has no subrogation interest in the third-party wrongful death recovery because the payments it has made, and will make, were and will be to Melvin Montgomery, who is not a beneficiary of the wrongful death action; and that if the subrogation interest is paid that it should be reduced to present value since the carrier is paying the death benefits over a period of years rather than in a lump sum. As far as the record shows the appellants have no right to appeal from the order, and the appeal is dismissed. Only a party aggrieved by a judgment or order may appeal from it, *Coburn v. Roanoke Land and Timber Corporation*, 260 N.C. 173, 132 S.E. 2d 340 (1963), and the record does not show that the appellants are aggrieved by the order appealed from. The party aggrieved is the one whose rights have been directly and adversely affected by the court's action, *Waldron Buick Co. v. General Motors Corp.*, 251 N.C. 201, 110 S.E. 2d 870 (1959), and under the facts recorded no right of the appellants has been directly and adversely affected by the Commission's order. Under G.S. 97-10.2(f)(1)d the administrator, rather than the appellants, is entitled to receive the balance remaining after the court costs, the attorneys' fees, and the employer's subrogation interest are paid; and the administrator did not appeal. Thus, whatever right the appellants may have to ultimately receive the balance of the wrongful death recovery from the decedent's personal representative, they have no right to receive anything from the Industrial Commission,

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either under the order appealed from or any order that may be entered by the Commission hereafter. For that matter the order recorded does not effectively distribute the balance of the funds to anyone. It directs only that the balance of the funds "be paid the plaintiffs as provided in the consent judgment"; but the consent judgment provides only for the distribution of the funds by "order of the North Carolina Industrial Commission."

In dismissing the appeal we note, however, that: The payment of the carrier's subrogation interest from the third-party recovery is mandated by G.S. 97-10.2, *Cox v. Pitt County Transportation Company, Inc.*, 259 N.C. 38, 129 S.E. 2d 589 (1963); the carrier's interest under G.S. 97-10.2 is the amount "paid or to be paid"; under G.S. 97-44 the carrier could be required at any time to pay the balance due Melvin Montgomery in a lump sum; even if the payments are not accelerated the amount distributed to the carrier, after counsel's fee is deducted, is obviously less than the amount it will eventually pay out.

Appeal dismissed.

Judges WELLS and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION**FILED 1 NOVEMBER 1988****STATE v. PEACOCK**
No. 888SC102Wayne
(86CRS13030)
(86CRS14562)
(86CRS14563)
(86CRS14564(A))
(86CRS14564(B))
(86CRS14564(C))
(86CRS14564(D))

No Error

WILSON v. WILSON
No. 8817DC306Surry
(85CVD759)

Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION	LARCENY
ADMINISTRATIVE LAW	LIBEL AND SLANDER
APPEAL AND ERROR	MALICIOUS PROSECUTION
ARBITRATION AND AWARD	MASTER AND SERVANT
ASSAULT AND BATTERY	MUNICIPAL CORPORATIONS
ATTORNEYS AT LAW	NARCOTICS
AUTOMOBILES AND OTHER VEHICLES	NEGLIGENCE
BANKS AND BANKING	PARENT AND CHILD
BASTARDS	PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS
BROKERS AND FACTORS	PLEADINGS
BURGLARY AND UNLAWFUL BREAKINGS	PRIVACY
CLERKS OF COURT	PROCESS
CONSPIRACY	QUASI CONTRACTS AND RESTITUTION
CONSTITUTIONAL LAW	RAPE AND ALLIED OFFENSES
CONTEMPT OF COURT	REFORMATION OF INSTRUMENTS
CONTRACTS	RETIREMENT SYSTEMS
CORPORATIONS	ROBBERY
COURTS	RULES OF CIVIL PROCEDURE
CRIMINAL LAW	SALES
DAMAGES	SCHOOLS
DECLARATORY JUDGMENT ACT	SEARCHES AND SEIZURES
DIVORCE AND ALIMONY	SHERIFFS AND CONSTABLES
EASEMENTS	SOCIAL SECURITY AND PUBLIC WELFARE
EMBEZZLEMENT	STATE
EMINENT DOMAIN	STATUTES
EVIDENCE	TAXATION
EXECUTORS AND ADMINISTRATORS	TORTS
FRAUD	TRIAL
GUARANTY	TRUSTS
HOMICIDE	UNFAIR COMPETITION
HUSBAND AND WIFE	UNIFORM COMMERCIAL CODE
INFANTS	VENDOR AND PURCHASER
INJUNCTIONS	VENUE
INSURANCE	WILLS
INTEREST	WITNESSES
JUDGMENTS	
JURY	

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

The evidence presented a jury question as to whether plaintiff's cashing of a check from defendant constituted an accord and satisfaction. *Moore v. Bobby Dixon Assoc.*, 64.

The trial court was not required to give defendant's requested instruction that the cashing of a check tendered in full payment of a disputed claim established accord and satisfaction as a matter of law. *Ibid.*

ADMINISTRATIVE LAW

§ 3. Duties and Authority of Administrative Boards and Agencies

The Department of Social Services did not act arbitrarily and capriciously in refusing to accept equivalent training and experience in the place of minimum educational requirements for an advertised position, and the statute providing for employment preference for veterans would not allow petitioner to sidestep the educational requirement. *Davis v. Vance County DSS*, 428.

§ 4. Procedure, Hearings, and Orders of Administrative Boards and Agencies

Delay of a decision by the State Personnel Commission by ten days beyond the time allowed by statute for rendering the decision did not entitle petitioner to have the hearing officer's decision reinstated. *Davis v. Vance County DSS*, 428.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

The trial court's order dismissing one of plaintiff's claims was immediately appealable. *Hoke v. E. F. Hutton and Co.*, 159.

§ 6.9. Appealability of Preliminary Matters and Mode of Trial

An order compelling plaintiff to answer a discovery request was not immediately appealable. *Mack v. Moore*, 478.

The State could properly appeal from an interlocutory order denying its motion to deny defendant's request for a jury trial. *State ex rel. Rhodes v. Simpson*, 517.

§ 7. Parties Who May Appeal; "Party Aggrieved"

The illegitimate adult daughters of a deceased employee were not entitled to appeal from an order of the Industrial Commission distributing the proceeds of a wrongful death settlement, since the administrator was entitled to receive the balance of funds remaining after the court costs, attorneys' fees, and employer's subrogation interest were paid and was thus the aggrieved party entitled to appeal. *Montgomery v. Bryant Supply Co.*, 734.

§ 13. Frivolous Appeals

Defendant's appeal is dismissed where he failed to comply with appellate rules, presented previously litigated issues, and had no standing to appeal on behalf of corporate defendants in receivership. *Lowder v. All Star Mills*, 621.

§ 24.1. Form of Exceptions and Assignments of Error

Plaintiff appellee's cross-assignments of error were ineffectual where they did not present an alternate basis to support the trial court's judgment. *U v. Duke University*, 171.

APPEAL AND ERROR – Continued**§ 25. Parties Entitled to Object and Take Exception**

The appellate court was without jurisdiction to determine a cross-assignment of error constituting an attack on a portion of the trial court's judgment. *Warfield v. Hicks*, 1.

§ 30.2. Form and Sufficiency of Objections

The issue of permanent injury was tried by the implied consent of the parties even though defendant failed to allege permanent injuries in her complaint. *Smith v. Buckhram*, 355.

§ 39.1. Time for Docketing Appeal

An appeal is subject to dismissal because of appellant's failure to file the record on appeal within 15 days after it was settled. *Taylor v. Foy*, 82.

Defendants' argument that the appeal should be dismissed for failure to include the summons in the record on appeal should have been addressed pursuant to a motion to dismiss under App. Rule 25, and defendants' argument that the appeal should be dismissed for failure to file a timely record on appeal should have been made under App. Rule 10(d). *Williams v. Hillhaven Corp.*, 35.

§ 62.1. Specific Instances Where New Trial Will Be Granted

A new trial was awarded not only on issues of damages but also on the merits of plaintiffs' claims for breach of contract and warranties in the construction of a house. *Warfield v. Hicks*, 1.

ARBITRATION AND AWARD**§ 1. Arbitration Agreements**

Claimant's right to arbitration was not barred by the statute of limitations where the agreement to arbitrate did not limit the period in which arbitration could be demanded. *In re Arbitration between Cameron and Griffith*, 164.

ASSAULT AND BATTERY**§ 3. Actions for Civil Assault**

The trial court correctly granted a directed verdict for two of three officers in a civil action for excessive force arising from plaintiff's arrest for disorderly conduct. *Myrick v. Cooley*, 209.

The evidence in a civil action for excessive force arising from plaintiff's arrest for disorderly conduct was not sufficient for a claim under 42 U.S.C. Section 1983, but was sufficient to take a common law claim of assault and battery to the jury. *Ibid.*

§ 16.1. Submission of Lesser Offenses not Required

The trial court in a prosecution for assault with a deadly weapon inflicting serious injury was not required to instruct on the lesser offense of simple assault. *S. v. Hensley*, 282.

§ 17. Verdict

The trial court did not err in failing to instruct the jury not to consider evidence of serious injury caused by a sexual offense in determining its verdict on an assault with a deadly weapon inflicting serious injury charge. *S. v. Hensley*, 282.

ATTORNEYS AT LAW

§ 7.5. Allowance of Fees as Part of Costs

The trial court in a criminal contempt proceeding erred in requiring defendant to pay plaintiff's attorney's fees. *M. G. Newell Co. v. Wyrick*, 98.

The trial court did not abuse its discretion in awarding plaintiff attorney's fees in the amount of \$27,686.10 in a breach of contract and unfair trade practice action. *McDonald v. Scarboro*, 13.

The trial judge erred in awarding attorney's fees and expenses against the corporate defendant where no issues were submitted to the jury concerning liability of the corporate defendant. *Taylor v. Foy*, 82.

The trial court could properly award attorney fees to respondent under G.S. 6-21.5 in a paternity action where the court found that there was a complete absence of a justiciable issue of law or fact concerning respondent's paternity of the child. *In re Williamson*, 668.

Where counsel appointed to represent respondent in a proceeding to terminate his parental rights also represented him in a related frivolous action by petitioners for a declaratory judgment as to paternity, the court erred in limiting the amount of attorney fees awarded to respondent in the paternity action under G.S. 6-21.5 to the court-appointed rate of \$35.00 per hour. *Ibid.*

§ 9. Persons Liable for Compensation of Attorney

The trial court did not err in a breach of contract action by denying defendant McCrary's Rule 50 motion on the issue of defendant's indemnification of defendant Scarboro's attorney's fees, but did err in its award of attorney's fees. *McDonald v. Scarboro*, 13.

AUTOMOBILES AND OTHER VEHICLES

§ 50.3. Sufficiency of Evidence of Negligence; Breach of Duty with Respect to Parking

Issues of negligence and contributory negligence should have been determined by the jury in an action for injuries sustained when plaintiff struck defendant's flatbed truck parked by defendant in the eastbound lane of travel with its flashers on to warn motorists that another truck was protruding into the lane of travel while it was in the loading bay area of defendant's warehouse. *Meadows v. Cigar Supply Co.*, 404.

§ 58.1. Sufficiency of Evidence of Negligence; Turning; Collision with Oncoming Vehicles

Defendant's turning of his van in front of plaintiff's approaching car to avoid a collision with a truck which was about to skid into the back of his van was not a willful or wanton act which would support punitive damages. *Nance v. Robertson*, 121.

§ 63.1. Sufficiency of Evidence of Negligence; Striking Children Darting into Road

The trial court erred in entering summary judgment for defendant in an action for the wrongful death of a child struck by defendant's vehicle. *Moore v. Wilson*, 279.

§ 91.5. Issues Relating to Damages

The trial court erred in instructing the jury on the aggravation of plaintiff's preexisting condition where there was no evidence supporting such an instruction. *Smith v. Buckhram*, 355.

AUTOMOBILES AND OTHER VEHICLES — Continued**§ 130.1. Driving While Impaired; Punishment; Second and Subsequent Offenses**

In sentencing defendant for driving while impaired, the trial judge acted within his discretion in finding that the aggravating factor of three prior convictions of impaired driving, though more than seven years before, substantially outweighed the mitigating factor of a clean driving record for more than five years prior to the present conviction. *S. v. Weaver*, 413.

BANKS AND BANKING**§ 4. Joint Accounts**

Where signature cards for three bank accounts designated the deceased and the defendant as joint tenants with right of survivorship, typed additions indicating that withdrawals were to be made only by the deceased were ineffective. *McLain v. Wilson*, 275.

BASTARDS**§ 8.1. Verdict and Findings on Issue of Paternity**

A general verdict of not guilty of a criminal charge of willful neglect or refusal to provide adequate support for an illegitimate child does not operate as res judicata on the issue of paternity in a subsequent civil action to establish paternity and require support of an illegitimate child. *Sampson County ex rel. McPherson v. Stevens*, 524.

BROKERS AND FACTORS**§ 4. Rights and Liabilities of Factors and Brokers to Principals**

Plaintiffs failed to state a claim under the federal "Racketeer Influenced and Corrupt Organizations Act" based upon defendant's check-kiting scheme. *Hoke v. E. F. Hutton and Co.*, 159.

BURGLARY AND UNLAWFUL BREAKINGS**§ 3. Indictment Generally**

A burglary indictment was sufficient where it averred that the crime was committed in the nighttime, and arrest of judgment was not required by failure to allege the hour or the specific year the crime was committed or by an improper reference to the hour of midnight as "12:00 a.m." *S. v. Mandina*, 686.

§ 5.3. Sufficiency of Evidence of Aiding and Abetting

There was sufficient evidence as to defendant's presence and a common plan or purpose to submit the charge of burglary to the jury under the theory of acting in concert. *S. v. Barnes*, 484.

§ 5.8. Sufficiency of Evidence of Breaking or Entering and Larceny of Residential Premises

The evidence sufficiently showed lack of consent in a burglary and larceny case where a house was forcibly entered while the owners were out of town and various items were taken. *S. v. Mandina*, 686.

CLERKS OF COURT

§ 4. Revocation of Letters of Administration

An action by a guardian ad litem of a minor trust beneficiary to remove defendant as trustee was properly transferred to the civil issue docket where defendant answered claiming defenses of laches, estoppel, and unclean hands. *In re Trust Under Will of Jacobs*, 138.

§ 10. Records and Books

The trial judge did not err by admitting testimony from the clerk of superior court that she had orally approved respondent's actions in several instances in an action to have respondent removed as executor of an estate. *Matthews v. Watkins*, 640.

CONSPIRACY

§ 5.1. Admissibility of Acts and Statements of Co-conspirators

In a prosecution for conspiring to traffic in cocaine, the court erred in admitting evidence of the participation of a previously acquitted individual in the alleged conspiracy. *S. v. Fryar*, 474.

CONSTITUTIONAL LAW

§ 13.1. Police Power; Regulation of Construction and Safety of Buildings

The trial court properly entered summary judgment for defendant town in plaintiff building contractor's action under 42 U.S.C. § 1983 alleging that the town negligently hired an unqualified building inspector whose erroneous decisions deprived plaintiff of property. *Gentile v. Town of Kure Beach*, 236.

§ 17. Personal and Civil Rights Generally

Directed verdict was properly granted for defendants on state and federal civil claims for false arrest and false imprisonment where plaintiff was convicted in district court of the charges for which he was arrested. *Myrick v. Cooley*, 209.

§ 20. Equal Protection Generally

A county's distribution of sales and use tax revenue on a per capita rather than an ad valorem basis pursuant to G.S. 105-472 did not violate equal protection, burden the right of interstate travel, or deprive out-of-state residents of their privileges and immunities under Art. IV, § 2 of the U.S. Constitution. *Town of Beech Mountain v. County of Watauga*, 87.

§ 28. Due Process and Equal Protection Generally in Criminal Proceedings

The statute providing for the extradition of juveniles does not violate equal protection or due process. *In re Teague*, 242.

§ 30. Discovery; Access to Evidence and other Fruits of Investigation

The trial court did not err by not allowing defense counsel to review the entire investigative file. *S. v. Alverson*, 577.

Defendant had no right to discover the criminal and parole records of a State's witness. *S. v. Mandina*, 686.

§ 65. Right of Confrontation Generally

The State's failure to produce money seized from defendant's person upon his arrest for possession of cocaine did not violate defendant's constitutional right to confront witnesses against him. *S. v. Alston*, 707.

CONSTITUTIONAL LAW — Continued**§ 75. Self-Incrimination; Testimony by Defendant**

Where defendant raised the issue of entrapment by his own testimony, he waived his privilege against self-incrimination regarding a prior sale of cocaine to an undercover SBI agent. *S. v. Artis*, 604.

CONTEMPT OF COURT**§ 5.1. Sufficiency of Notice and Show Cause Order**

Civil and criminal contempt adjudications were not invalid because defendant had only five hours notice of the hearing for civil contempt rather than the statutory five days and no notice at all that criminal contempt would be considered. *M. G. Newell Co. v. Wyrick*, 98.

§ 7. Punishment for Contempt

Defendants' appeal of an underlying judgment prevented the trial court from finding defendant in contempt until after the appeal was resolved. *In re Trust Under Will of Jacobs*, 138.

The trial court erred in requiring defendant in a criminal contempt proceeding to pay \$3,150 in damages to plaintiff. *M. G. Newell Co. v. Wyrick*, 98.

Provisions in contempt adjudications suspending jail sentences upon the condition that defendant not compete with plaintiff before 31 December 1988 were invalid where the consent judgment which defendant violated provided for the non-competition term to end on 31 January 1988. *Ibid.*

CONTRACTS**§ 12.2. Interpretation of Ambiguous Agreements**

Where a contract for the sale of a map distribution business to defendants limited the amount of sales plaintiffs could make in the final four months of owning the business, the trial court properly considered parol evidence and found that the cap on "orders placed" was to be based on the final invoice to a customer, which included costs for artwork, advertising, shipping, taxes, and overruns, rather than on the original customer orders. *Lewis v. Carolina Squire, Inc.*, 588.

§ 27.2. Sufficiency of Evidence of Breach of Contract

Plaintiffs were entitled to summary judgment in their action for defendant's breach of an agreement to purchase shares of stock from plaintiffs. *Atkins v. Mitchell*, 730.

§ 27.3. Sufficiency of Evidence of Damages

The trial court properly instructed the jury that no more than nominal damages could be awarded on plaintiff's breach of express contract claim where plaintiff failed to establish the amount of damages for lost profits. *Catoe v. Helms Construction & Concrete Co.*, 492.

§ 29. Measure of Damages Generally

The jury should have been allowed to determine whether the proper measure of damages for breach of contract and breach of warranty in the construction of a house was diminished value or cost of repairs based on its finding as to whether a substantial portion of the work would have to be undone. *Warfield v. Hicks*, 1.

CONTRACTS — Continued**§ 34. Sufficiency of Evidence of Interference with Contractual Rights by Third Persons**

The trial court did not err by denying defendant's Rule 50 motion to dismiss plaintiff's claims of wrongful inducement and interference with contract. *McDonald v. Scarboro*, 18.

CORPORATIONS**§ 18. Sale and Transfer of Stock**

Plaintiffs' allegation in an action for breach of contract to purchase shares of stock that the amount of damages sought "represented the aggregate contract purchase price" sufficiently stated a claim to recover the purchase price under G.S. 25-8-107, and plaintiffs were not limited to recovery of the difference between fair market value and unpaid contract price. *Atkins v. Mitchell*, 730.

In an action to recover damages for breach of an agreement to purchase shares of stock, a genuine issue of material fact existed regarding whether efforts at reselling the securities would be unduly burdensome or whether there was a readily available market for their resale. *Ibid.*

COURTS**§ 5. Concurrent Original Jurisdiction**

State courts have concurrent jurisdiction with federal courts in actions under the federal "Racketeer Influenced and Corrupt Organizations Act." *Hoke v. E. F. Hutton and Co.*, 159.

CRIMINAL LAW**§ 7. Entrapment**

Defendant was not entitled to an instruction on entrapment in a prosecution for conspiring to traffic in, possessing and transporting cocaine which arose out of an undercover operation. *S. v. Fryar*, 474.

§ 11. Accessories after the Fact

A defendant convicted of accessory after the fact to second degree murder is entitled to a new trial on that charge because the appellate court granted a new trial to the principal on the ground that the principal's in-custody statements were erroneously admitted. *S. v. Robey*, 198.

§ 15. Venue

The trial court erred in entering out of session its order denying defendant's motion for a change of venue, dated 8 August 1986, nunc pro tunc to 23 April 1986, and the order was a nullity, but the effect was the same as a denial of defendant's motion. *S. v. Mandina*, 686.

§ 15.1. Pretrial Publicity as Ground for Change of Venue

Defendant was not prejudiced by the trial court's denial of his motion for a change of venue based on pretrial publicity. *S. v. Mandina*, 686.

§ 26.5. Former Jeopardy; Same Acts or Transaction Violating Different Statutes

A defendant convicted of second degree sexual offense and assault with a deadly weapon inflicting serious injury was not punished twice for the same conduct

CRIMINAL LAW — Continued

because the trial court failed to instruct the jury not to consider evidence of serious injury caused by the sexual offense in determining its verdict on the assault charge. *S. v. Hensley*, 282.

§ 34. Evidence of Defendant's Guilt of other Offenses; Inadmissibility

A police officer's testimony that defendant's fingerprints matched those of a person with another name and that the officer knew defendant as that other person in another county was not admissible to show identity and was improperly admitted because it implied the commission of other crimes or wrongs by defendant. *S. v. General*, 375.

§ 34.1. Evidence of Defendant's Guilt of other Offenses; Inadmissibility to Show Defendant's Character and Disposition to Commit Offense

The trial court erred in a prosecution for second degree murder by admitting evidence of other alleged crimes by defendant and the evidence was cumulatively prejudicial. *S. v. Emery*, 24.

§ 42.6. Articles Connected with Crime; Chain of Custody

Defendant did not raise a chain of custody problem with regard to fiber evidence seized from a car allegedly driven by defendant when he alleged that the State failed to secure the vehicle. *S. v. Mandina*, 686.

§ 43. Photographs

Photographs of money taken from defendant's person at the time of his arrest were properly admitted for illustrative purposes. *S. v. Alston*, 707.

§ 45. Experimental Evidence

The trial court did not err in admitting testimony concerning an experiment with a pair of bolt cutters, and a proper foundation was laid for admission of the bolt cutters where a witness identified the bolt cutters as those found at the crime scene. *S. v. General*, 375.

§ 61.2. Shoe Prints

The trial court did not err in admitting testimony concerning shoe print comparison evidence. *S. v. General*, 375.

§ 73.2. Statements not Within Hearsay Rule

In a sexual offense and indecent liberties case in which the child victim refused to testify, the trial court erred in admitting a statement given by the victim to the investigating officer without making the specific findings and conclusions with regard to the unavailability of a witness required by Rule of Evidence 804(b)(5). *S. v. Benfield*, 228.

§ 75.4. Admissibility of Confession; Confessions Obtained in Absence of Counsel

Defendant's March 20 statement and March 21 confession in the absence of counsel were both products of police-initiated interrogations after defendant had asserted her right to counsel and thus were obtained in violation of her constitutional right to counsel. *S. v. Robey*, 198.

§ 76.2. Voluntariness of Confession; Voir Dire Hearing

The trial court did not err in ending a voir dire hearing without giving defendant the right to cross-examine a police officer or to present evidence when the court determined that no custodial statements by defendants were to be offered at trial. *S. v. General*, 375.

CRIMINAL LAW — Continued**§ 86.3. Credibility of Defendant; Prior Convictions; Further Cross-Examination of Defendant**

The trial court did not abuse its discretion in a prosecution for first degree sexual offense by allowing further questioning of defendant regarding a prior escape. *S. v. Russell*, 581.

Where defendant raised the issue of entrapment by his own testimony, he waived his privilege against self-incrimination regarding a prior sale of cocaine to an undercover SBI agent. *S. v. Artis*, 604.

§ 89.3. Corroboration; Prior Statements of Witness

The trial court erred in admitting for corroborative purposes the prior statement of an alleged co-conspirator that defendant was very active in persuading him to commit a robbery since the statement added neither weight nor credibility to his trial testimony that he was unable to remember if defendant participated in the discussions concerning the robbery. *S. v. Reynolds*, 103.

§ 91.12. Speedy Trial; Periods Excluded from Time Computation; Pretrial Motions

The defendant in a prosecution for second degree murder was not denied his statutory right to a speedy trial by a delay of 474 days between indictment and trial when delays for pending motions were excluded. *S. v. Emery*, 24.

§ 92.2. Consolidation of Charges against Multiple Defendants; Consolidation Held Proper; Related Offenses

The statement in *State v. Cox*, 37 N.C. App. 356, that armed robbery and accessory charges were "mutually exclusive" and thus not joinable has no application where two different defendants have been charged as principal felon and accessory after the fact. *S. v. Robey*, 198.

§ 95.2. Admission of Evidence Competent for Restricted Purpose; Form and Effect of Instruction

Defendant was not prejudiced by the trial court's omission of the word "not" from the court's limiting instruction that "you may consider only evidence of other offenses for any purpose other than these which I have just explained to you." *S. v. Mandina*, 686.

§ 99.5. Trial Court's Expression of Opinion on the Evidence during Trial; Admonition of Counsel

The trial court did not express an opinion in a prosecution for rape where the judge's comments were routinely made in the course of control of examination and cross-examination of witnesses. *S. v. Alverson*, 577.

Defendant was not prejudiced by the court's statement, "We have entertained a lot of irrelevant evidence that nobody objected to." *S. v. Artis*, 604.

§ 99.6. Trial Court's Expression of Opinion; Conduct in Connection with Examination of Witnesses

The trial court did not violate defendant's right to a fair trial by interrupting the testimony of a witness and addressing remarks to the witness and his counsel where all of the court's comments were made out of the hearing of the jury. *S. v. Barnes*, 484.

CRIMINAL LAW — Continued**§ 102.8. Jury Argument; Comment on Failure to Testify**

The prosecutor's comments during closing argument concerning defendant's "taking the Fifth" were not improper comments on defendant's decision not to testify but were directed at defendant's improper attempt to assert the privilege after the court had ruled no privilege existed. *S. v. Artis*, 604.

§ 113.6. Charge Where There Are Several Defendants

Defendant who was tried with an accomplice was not prejudiced by the trial court's use of "and/or" in the jury instructions. *S. v. Barnes*, 484.

§ 113.7. Charge as to Acting in Concert

The trial court's alleged failure properly to instruct the jury that defendant must have been present at the time of the crimes in order to be guilty under the doctrine of acting in concert did not amount to plain error. *S. v. Barnes*, 484.

§ 122.1. Jury's Request for Additional Instructions

The trial court erred in discussing a jury's question with the foreman only to the exclusion of the rest of the jury. *S. v. Tucker*, 511.

§ 124.1. Sufficiency and Effect of Verdict; Ambiguity and Uncertainty of Language; Clerical Errors

The trial court's misrecital of the indictment number in the judgment and commitment did not constitute grounds for arrest of judgment. *S. v. Mandina*, 686.

§ 138.6. Severity of Sentence; Matters and Evidence Considered

Receiving the thoughts of a victim's relatives as to sentence is a practice which is not encouraged. *S. v. Jackson*, 124.

There was no merit to defendant's contention that victim impact statements should not be received unless preceded by live testimony. *Ibid.*

§ 138.14. Fair Sentencing Act; Consideration of Aggravating and Mitigating Factors in General

There was no abuse of discretion in the imposition of a 35-year sentence for second degree rape where there were no mitigating factors and the judge found as an aggravating factor that defendant had prior convictions. *S. v. Alverson*, 577.

The trial court did not abuse its discretion in determining that the one aggravating factor of a prior conviction outweighed three mitigating factors. *S. v. Artis*, 604.

Where the court imposed a term in excess of the presumptive sentence for sale of cocaine, the court was required to find aggravating and mitigating factors, and it was not sufficient that the court made such findings as to a possession conviction. *Ibid.*

§ 138.16. Fair Sentencing Act; Aggravating Factor of Inducement of Others to Participate

The same evidence was not used to support aggravating factors that a killing had been planned for two months and was premeditated and that defendant induced another to conspire with him in the murder. *S. v. Jackson*, 124.

§ 138.28. Fair Sentencing Act; Aggravating Factor of Prior Convictions

A defendant convicted of second degree murder waived his right to appeal any possible error in the district attorney's unsupported statements at sentencing regarding prior convictions by not objecting to them. *S. v. Bradley*, 559.

CRIMINAL LAW — Continued**§ 138.29. Fair Sentencing Act; Other Aggravating Factors**

The evidence supported the trial court's finding as an aggravating factor that a second degree murder had been planned for two months and was premeditated. *S. v. Jackson*, 124.

DAMAGES**§ 11.2. Punitive Damages; Circumstances Where Inappropriate**

Defendant's turning of his van in front of plaintiff's approaching car to avoid a collision with a truck which was about to skid into the back of his van was not a willful or wanton act which would support punitive damages. *Nance v. Robertson*, 121.

DECLARATORY JUDGMENT ACT**§ 4.3. Availability of Remedy in Insurance Matters**

Plaintiff could not seek a declaratory judgment to determine the maximum liability owed by defendant insurers to plaintiff under their respective automobile liability policies prior to a jury trial on the merits of plaintiff's claim against the insurers. *Newton v. Ohio Casualty Ins. Co.*, 421.

§ 5. Pleading

Plaintiff's complaint was sufficient to state a claim for declaratory relief against a bank and the State based on plaintiff's execution of a surety bond for the State after securities plaintiff had on deposit with the Commissioner of Insurance were lost or stolen. *Selective Ins. Co. v. NCNB*, 597.

DIVORCE AND ALIMONY**§ 23. Jurisdiction and Venue of Child Custody and Support Actions Generally**

Defendant was not prejudiced when his motion for change of child custody and for child support was placed on the regular domestic calendar rather than on the expedited calendar for domestic cases. *Payne v. Payne*, 71.

§ 24. Child Support Generally

The trial court did not err in refusing to consider the affidavit of one of defendant's children in a hearing on a motion for child custody and support where the affidavit was offered after defendant's motion to amend the judgment had been heard and without notice to plaintiff. *Payne v. Payne*, 71.

§ 24.4. Enforcement of Child Support Orders; Contempt

While failure to comply with a child support order must be willful in order to be the basis for a contempt proceeding, a defendant may not deliberately divest himself of his assets by voluntarily placing them in bankruptcy and thereby render himself unable to comply with the order so that he can escape a contempt citation. *Harris v. Harris*, 699.

§ 24.5. Modification of Child Support Order; Changed Circumstances

Defendant's voluntary filing of a petition in bankruptcy did not constitute a substantial change of circumstances which would warrant a reduction in his child support payments. *Harris v. Harris*, 699.

DIVORCE AND ALIMONY — Continued**§ 24.9. Child Support; Findings**

The trial court erred in modifying child support provisions of a separation agreement where the court made no findings as to the reasonable expenses of the parties and no specific findings with respect to the actual past or present expenses incurred for the support of the children. *Holderness v. Holderness*, 118.

The trial court's findings were insufficient to support its conclusion that plaintiff should not be required to support her minor children. *Payne v. Payne* 71.

§ 25.9. Modification of Child Custody Order; Where Evidence of Changed Circumstances Is Sufficient

The trial court in a child custody proceeding did not err in failing to resolve whether or why statements were made by the child concerning painful sexual contact with a man named "Rod," the same name as that of defendant's boyfriend. *Williams v. Williams*, 469.

Although prior child custody orders had restricted the presence of the mother's boyfriend around the child, the trial court did not exceed its authority in placing custody of the child with the mother after the mother married her boyfriend. *Ibid.*

The admission of testimony in a child custody proceeding that the DSS had investigated alleged sexual abuse of the child and "unsubstantiated" the charge was not prejudicial. *Ibid.*

§ 26.2. Modification of Foreign Child Support Orders; Requirement of Changed Circumstances

The trial court erred in modifying a Georgia child support decree where there were no findings showing a change of circumstances. *Shores v. Shores*, 435.

§ 26.3. Modification of Foreign Child Support Orders; Residency Requirement; Effect of Child's Presence

The district court erred in concluding that it did not have jurisdiction over the subject matter or the parties where plaintiff sought modification of a Virginia child support order. *Morris v. Morris*, 432.

The trial court in a proceeding to increase child support did not err in finding that North Carolina was the home state of the child where the child and plaintiff had resided in Winston-Salem since 1982. *Shores v. Shores*, 435.

§ 27. Attorney's Fees Generally

The trial court made insufficient findings to support an order awarding plaintiff attorney's fees in an action for child support. *Harris v. Harris*, 699.

§ 30. Equitable Distribution

The trial court erred in finding that certain household furnishings were marital property where they were purchased before marriage with money provided by plaintiff's grandmother. *Tiryakian v. Tiryakian*, 128.

A portion of an automobile should be denominated plaintiff husband's separate property where plaintiff's grandmother gave him money which he deposited in the parties' joint bank account and later used to pay off the loan on the car. *Ibid.*

Where the husband made a down payment on a car before the marriage and the car was titled in both parties' names, the trial court erred in finding that the husband intended to make a gift to the wife of a half interest in the car and that the car was entirely marital property. *Ibid.*

DIVORCE AND ALIMONY — Continued

The trial court's order dividing marital property after the parties agreed to an equal division and stipulated the values of much of their property was affirmed. *Lefler v. Lefler*, 286.

Where the failure to assist in the compilation and valuation of marital property during litigation causes one party to incur additional expenses, the court may consider such financial consideration in making its distributive award. *Shoffner v. Shoffner*, 399.

Modification of a child support order concerning the depository at which payments may be made does not come within the rule that an equitable distribution order must be entered prior to alimony or child support awards or modification of those already in existence. *Ibid.*

The valuation of pensions after the date of separation was not error where there was no showing that either of the parties made any additional contributions or that any additional interest had accrued to the pensions during the seven-day interval between the date of separation and the date of valuation. *Ibid.*

EASEMENTS

§ 5.3. Creation of Easements by Implication; Sufficiency of Pleadings and Evidence

The trial court's findings were sufficient to support its conclusion that an easement by implication existed across defendants' land even though an alternate means of ingress and egress existed. *Jones v. Carroll*, 438.

EMBEZZLEMENT

§ 6. Sufficiency of Evidence

A director of continuing education for a technical school who allegedly executed contracts with "bogus" instructors to teach nonexistent adult education classes to fictional students and received a portion of the instructors' pay from the technical school was not guilty of embezzlement. *S. v. Bonner*, 424.

EMINENT DOMAIN

§ 13. Actions by Owner for Compensation or Damages

The trial court erred in an inverse condemnation action by granting summary judgment for defendants based on the statute of limitations. *McAdoo v. City of Greensboro*, 570.

The trial court did not err by granting summary judgment for defendant city on trespass claims in an action arising from the widening of a road because the city's power of eminent domain insulates it from trespass actions regardless of whether compensation was paid or proper procedures used. *Ibid.*

EVIDENCE

§ 33. Hearsay Evidence in General; Rule of Inadmissibility

The admission of testimony in a child custody proceeding that the DSS had investigated alleged sexual abuse of the child and "unsubstantiated" the charge was not prejudicial. *Williams v. Williams*, 469.

EVIDENCE — Continued**§ 33.2. Examples of Hearsay Testimony**

Statements made by a child to a psychiatrist were admissible under the medical diagnosis and treatment exception to the hearsay rule. *Williams v. Williams*, 469.

§ 40. Nonexpert Opinion Evidence in General

The trial court did not improperly allow opinion testimony by defendant even though the court did not make specific findings about defendant's qualifications as an expert. *Cato Equipment Co. v. Matthews*, 546.

§ 46.1. Nonexpert Opinion Evidence; Other Matters

Testimony by plaintiff's wife concerning Japanese society's perception of lawsuits was admissible lay opinion testimony. *U v. Duke University*, 171.

§ 50. Testimony by Medical Experts in General

Opinion testimony by a chiropractor concerning injury to plaintiff's ligaments was within the scope of chiropractic, and defendants waived objection to opinion testimony concerning damage to muscles. *Smith v. Buckhram*, 355.

EXECUTORS AND ADMINISTRATORS**§ 37. Costs, Commissions, and Attorney's Fees; Right to Compensation**

The trial judge did not err in an action to revoke letters testamentary by concluding that the will mandated that respondent employ his own law firm and that respondent's actions did not constitute default or misconduct. *Matthews v. Watkins*, 640.

§ 37.1. Costs, Commissions, and Attorney's Fees; Amount and Basis of Compensation

Fees awarded under G.S. 28A-23-4 should be for actual services rendered and should not be based solely upon the size of the estate. *Matthews v. Watkins*, 640.

There was no reversible error in an action to remove an executor from the award of attorney's fees based on a percentage of the estate. *Ibid.*

The trial court did not err in an action to remove respondent as an executor of an estate by finding that the executor's commissions could be paid on the proceeds of the sale of real property. *Ibid.*

FRAUD**§ 9. Pleadings**

The trial court properly dismissed plaintiff's claim for fraud based on defendant insurer's refusal to pay an insurance claim for private duty nursing. *Von Hagel v. Blue Cross and Blue Shield*, 58.

The trial court did not err by dismissing defendant's amended counterclaim where defendants alleged fraud but did not allege misrepresentation or concealment and failed to be particular about their assertions of fraud. *Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales and Service*, 539.

§ 12.1. Insufficiency of Evidence

Evidence that defendant builder told plaintiffs the use of beetle infested decorative beams in a house being constructed for plaintiffs would pose no problems other than a little sawdust was insufficient to support a claim for fraud. *Warfield v. Hicks*, 1.

GUARANTY

§ 2. Actions to Enforce Guaranty

Only a parent corporation, and not a division or a subsidiary of the parent, could recover on a guaranty executed to the parent by defendant. *Palm Beach, Inc. v. Allen*, 115.

HOMICIDE

§ 21.8. Sufficiency of Evidence of Second Degree Murder; Where Defendant Enters Plea of Self-Defense

The evidence was sufficient to support a conviction for second degree murder. *S. v. Bradley*, 559.

§ 26. Instructions on Second Degree Murder

The trial court erred in a prosecution for second degree murder which arose from a robbery by giving an instruction which could have allowed a conviction for second degree murder based on the *mens rea* for robbery. *S. v. Hunt*, 574.

HUSBAND AND WIFE

§ 2.1. Antenuptial Agreements; Effect of Fraud

The failure fully to disclose one's financial status is a ground for invalidating an antenuptial agreement. *Tiryakian v. Tiryakian*, 128.

§ 13. Separation Agreement; Enforcement

The trial court properly denied plaintiff's request for attorney fees based on her contention that defendant materially breached the parties' separation agreement and, by its terms, was responsible as the defaulting party for the payment of attorney fees. *Brown v. Brown*, 335.

§ 24. Alienation of Affections in General; Elements of Action

Where defendant contended that her actions supporting plaintiff's claim for alienation of affections occurred in other states which do not recognize such a claim, the question of where the tort occurred giving rise to defendant's liability was an issue of fact material to both the substantive law applicable to plaintiff's cause of action and defendant's defense and should have been submitted to the jury. *Darnell v. Rupplin*, 349.

INFANTS

§ 10. Purpose and Construction of Juvenile Court Statutes

For the trial court to order that a juvenile be returned to another state, the trial court must find that the requisition from the requesting state is in order and that the name and age of the delinquent juvenile on such requisition are the same as the juvenile before the court. *In re Teague*, 242.

The statute providing for the extradition of juveniles does not violate equal protection or due process. *Ibid.*

INJUNCTIONS

§ 11. Injunctions against Public Boards, Officers, or Agencies

A plaintiff may be entitled to prospective injunctive relief in state court against defendants in their official capacities to the same extent as in federal court. *Truesdale v. University of North Carolina*, 186.

INJUNCTIONS — Continued**§ 13. Grounds for Issuance or Continuance of Temporary Orders Generally**

The trial court erred in entering a preliminary injunction preventing defendant from discussing his grievances with plaintiff's neighbors, friends, and co-workers where there was no primary action to which the preliminary injunction could attach. *Brown v. Brown*, 335.

INSURANCE**§ 44. Health Insurance; Actions to Recover Benefits**

Plaintiff's complaint was sufficient to support a claim for bad faith refusal to pay a justifiable insurance claim for private duty nursing. *Von Hagel v. Blue Cross and Blue Shield*, 58.

§ 69. Automobile Insurance; Protection against Injury by Uninsured or Unknown Motorists Generally

Where an employer provided an employee automobile liability and underinsured motorist coverage, the automobile insurer was not entitled to reduce its underinsured motorist obligation to the employee by the amount of workers' compensation paid to the employee. *Manning v. Fletcher*, 393.

Since defendant insurance company waived its rights to subrogation for the payment of uninsured and underinsured motorists claims, it suffered no prejudice by plaintiff's signing of a settlement with the tortfeasor without defendant's consent, and it was required to recognize plaintiff's claim for underinsurance coverage. *Rinehart v. Hartford Casualty Ins. Co.*, 368.

§ 79. Automobile Liability Insurance Generally

Where plaintiff had already received from solvent automobile insurers an amount equal to an insolvent insurer's policy limits, the N.C. Insurance Guaranty Association had no obligation to pay on plaintiff's claim. *Rinehart v. Hartford Casualty Ins. Co.*, 368.

§ 81. Automobile Insurance; Assigned Risk Insurance

G.S. 20-309(e) (1983) required plaintiff insurer to notify the Division of Motor Vehicles of the termination of an insured's automobile liability coverage, and its failure to do so kept the insurance in effect. *Allstate Ins. Co. v. McCrae*, 505.

§ 85. Automobile Liability Insurance; "Use of other Automobiles" Clause; "Non-owned Automobile" Clause

Liability coverage was excluded under a policy issued to defendant driver's wife, although the driver was a "covered person," where the driver had an equitable interest in the vehicle in question which was sufficient to make him, rather than his wife, the "owner" of the vehicle. *Jenkins v. Aetna Casualty & Surety Co.*, 388.

§ 126. Fire Insurance; Conditions as to Sole Ownership and Encumbrances

Where plaintiff made a false and material representation of ownership to defendant after a fire, the trial court was required to determine whether plaintiff knowingly and willfully made the false statements and whether the insurance policy issued by defendant was voided. *Harris v. N.C. Farm Bureau Mutual Ins. Co.*, 147.

§ 131. Fire Insurance; Computation of Loss

Where plaintiff leased a house with an option to purchase and made improvements thereon, the unexercised option did not qualify as an insurable interest,

INSURANCE — Continued

and plaintiff was entitled to recover under a fire insurance policy only for the value of the use of the house, including the use of the improvements for a period of time corresponding to the unexpired term of the lease. *Harris v. N.C. Farm Bureau Mutual Ins. Co.*, 147.

INTEREST**§ 2. Time and Computation**

The trial court did not err in awarding plaintiff interest on compensatory damages for slander from the date of commencement of the action. *U v. Duke University*, 171.

JUDGMENTS**§ 55. Right to Interest**

The trial court did not err in awarding plaintiff interest on compensatory damages for slander from the date of commencement of the action. *U v. Duke University*, 171.

JURY**§ 1. Nature and Extent of Right to Jury Trial**

Defendant was entitled to a jury trial in an action in which the State sought to enjoin defendant from developing or filling in coastal wetlands and to require her to remove materials illegally put there. *State ex rel. Rhodes v. Simpson*, 517.

LARCENY**§ 4. Indictment**

An indictment charging that larceny was committed pursuant to a violation of G.S. 14-51 was sufficient to apprise defendant that he was charged with larceny punishable as a felony because it was committed pursuant to burglary, and the indictment was not required to set forth facts supporting the elements of common law burglary. *S. v. Mandina*, 686.

§ 7.8. Sufficiency of Evidence of Felonious Breaking or Entering and Larceny

Defendant could properly be convicted of felonious larceny pursuant to a breaking or entering even though there was a mistrial on the breaking or entering charge, and the evidence was sufficient to support the larceny conviction. *S. v. Powell*, 441.

LIBEL AND SLANDER**§ 5.2. Particular Statements as Actionable Per Se or Per Quod; Imputations Affecting Business, Trade, or Profession**

Plaintiff failed to show that written statements by his supervisor relating to his work constituted libel *per quod*. *U v. Duke University*, 171.

Statements by defendant to plaintiff's colleague that plaintiff was "a liar, deceitful, absolutely useless, and does not have a Ph.D., and was a fraud" constituted slander *per se*. *Ibid.*

LIBEL AND SLANDER — Continued**§ 9. Qualified Privilege**

A report made in good faith by a school principal to the Assistant Superintendent of Personnel clearly fell within the scope of immunity contemplated by G.S. 7A-550 so that the report could not serve as the basis for a defamation action. *Davis v. Durham City Schools*, 520.

§ 16. Sufficiency of Evidence

Summary judgment was properly entered for defendants in a libel action based on a newspaper editorial stating that plaintiff former sheriff "lied when he initially denied having sex with" the girlfriend of a prisoner in plaintiff's custody. *Proffitt v. Greensboro News & Record*, 218.

MALICIOUS PROSECUTION**§ 4. Want of Probable Cause**

Plaintiff's claims based upon a criminal action resulting from a school principal's report to the DSS that plaintiff substitute teacher may have physically abused students while disciplining them were barred by G.S. 7A-550. *Davis v. Durham City Schools*, 520.

§ 13. Sufficiency of Evidence Generally

The restraint of plaintiff from entering a building owned by Duke University where a Thermotron was located did not constitute a substantial interference with plaintiff's person so as to constitute proof of special damages in a malicious prosecution action. *U v. Duke University*, 171.

§ 13.2. Sufficiency of Evidence of Probable Cause

Plaintiff's evidence was insufficient to show that Duke University lacked probable cause to institute an action against plaintiff for conversion of a Thermotron and for a restraining order requiring plaintiff to return parts he had taken from the Thermotron. *U v. Duke University*, 171.

MASTER AND SERVANT**§ 8. Terms of Employment Contract Generally**

Defendant's employment manual did not become a part of plaintiff's oral contract of employment with defendant. *Rosby v. General Baptist State Convention*, 77.

§ 8.1. Compensation of Employee

The trial court's findings that the salaries and other remuneration paid to plaintiffs were intended by defendants to compensate plaintiffs for the first forty hours worked each week were supported by the evidence insofar as those findings related to the periods during which plaintiffs were employed to work 24-hour shifts. *Jones v. Jefferson and Ireland v. Jefferson and Totten v. Jefferson*, 389.

The evidence in an action to recover for alleged minimum wage and overtime violations of the FLSA was sufficient to support the trial judge's finding that plaintiffs, who were live-in supervisors in defendants' residential group care facilities for elderly people, worked 24 hours per day when employed full time. *Ibid.*

The trial court erred in its calculations of back wages liability by inconsistently granting credit to defendant employers for lodging provided to one plaintiff but refusing them credit for lodging provided to two other plaintiffs based on its find-

MASTER AND SERVANT — Continued

ing that the lodging was not suitable and adequate and not comparable to plaintiffs' own homes. *Ibid.*

The trial court did not err in finding that defendant employers had not satisfactorily established a good faith and reasonable belief defense for violations of the FLSA, and it was within the discretion of the court to award liquidated damages, but the court could not award both liquidated damages and prejudgment interest. *Ibid.*

The trial court erred in finding that violations of the FLSA were willful and in extending the period of limitations to three years based on that finding. *Ibid.*

§ 10. Duration and Termination of Employment

Plaintiff's oral employment contract which contained no provision governing the duration or termination of employment was terminable at will. *Rosby v. General Baptist State Convention*, 77.

Plaintiff failed to allege consideration in addition to services which would take her employment contract beyond employment at will where she alleged that she continued her education while working part time as a nurse for defendant employer and that she assumed a full-time supervisory position after completing her education. *Williams v. Hillhaven Corp.*, 35.

Upon the termination of plaintiff's employment, defendant was required to pay the ad valorem taxes on plaintiff's house for 1984 but was not required to pay taxes, insurance, and college expenses which accrued or became due after plaintiff's employment ceased, and defendant had no right to collect a loan for plaintiff's house until expiration of the seven-year period provided for in the employment contract. *Wyatt v. Nash Johnson & Sons Farms*, 255.

Defendant employers waived their right to rely on a stipulation regarding dates of employment. *Jones v. Jefferson* and *Ireland v. Jefferson* and *Totten v. Jefferson*, 289.

§ 10.2. Actions for Wrongful Discharge

Plaintiff's complaint stated a claim for wrongful discharge in violation of public policy where she alleged that she was fired because she testified at an unemployment compensation hearing on behalf of another employee who had been fired. *Williams v. Hillhaven Corp.*, 35.

An employee at will does not state an action for wrongful discharge against his employer when he claims that the sole reason for his discharge was his refusal to violate federal DOT regulations. *Coman v. Thomas Manufacturing Co.*, 327.

The amended statute of limitations for wrongful discharge applied to plaintiff's action based on a discharge which occurred prior to the time of the amendment. *Whitt v. Roxboro Dyeing Co.*, 636.

§ 11.1. Competition with Former Employer; Covenants not to Compete

A covenant not to compete entered into seven years after the original employment was invalid as a matter of law where it failed to contain a statement of the consideration. *Brooks Distributing Co. v. Pugh*, 715.

A covenant not to compete entered into at the beginning of defendant's employment and specifically referred to in defendant's employment contract was not facially invalid for lack of consideration. *Ibid.*

§ 13. Interference with Contract of Employment by Third Persons

Plaintiff's complaint was insufficient to show that defendant nursing home administrator's motives for procuring the termination of plaintiff's employment con-

MASTER AND SERVANT — Continued

tract were not related to his business interest in the contract so as to render defendant amenable to a claim for tortious interference with plaintiff's contract of employment. *Williams v. Hillhaven Corp.*, 35.

§ 55.1. Workers' Compensation; Necessity for and what Constitutes "Accident"

Plaintiff did not sustain a compensable injury by accident when he experienced pain in his back while jumping down from a truck and bending over to pick up trash. *Lettley v. Trash Removal Service*, 625.

§ 68. Workers' Compensation; Occupational Diseases

Plaintiff was partially disabled where she contracted the occupational disease tendonitis while performing her duties as an inspect-fold operator and was given an intracompany transfer to a position where she made over \$100 less per week. *Thomas v. Hanes Printables*, 45.

§ 79. Workers' Compensation; Persons Entitled to Payment Generally

The illegitimate adult daughters of a deceased employee were not entitled to appeal from an order of the Industrial Commission distributing the proceeds of a wrongful death settlement, since the administrator was entitled to receive the balance of funds remaining after the court costs, attorneys' fees, and employer's subrogation interest were paid and was thus the aggrieved party entitled to appeal. *Montgomery v. Bryant Supply Co.*, 734.

§ 108. Right to Unemployment Compensation Generally

Petitioner's separation from employment earlier than the future date specified by the employer was voluntary and without good cause, but petitioner was entitled to unemployment benefits for the period of time after the date on which employment was scheduled to terminate. *Seaberry v. W. T. Bridgers Contract Labor*, 499.

§ 114. Occupational Health and Safety Act Generally

The OSHA Review Board acted properly in applying the reasonable man standard in determining whether a recognized hazard existed in respondent's workplace. *Brooks, Com'r. of Labor v. Rebarco, Inc.*, 459.

Findings by the OSHA Review Board were sufficient to support conclusions that respondent's practice of unhooking a crane from a concrete form before attaching all braces to the form was a recognized hazard, that effective means existed to abate the hazard, and that it was foreseeable that the hazard could result in serious injury or death. *Ibid.*

The evidence was sufficient to support the OSHA Review Board's conclusion that respondent violated a federal regulation by failing to maintain safe electrical plugs and extension cords. *Ibid.*

MUNICIPAL CORPORATIONS**§ 12.3. Waiver of Governmental Immunity**

A waiver of governmental immunity by the purchase of insurance is not negated by the insurer's insolvency. *McDonald v. Village of Pinehurst*, 633.

§ 14.1. Duty to Maintain Streets in Reasonably Safe Condition and Liability for Injuries Resulting from Negligent Maintenance

Defendant city had no governmental immunity from civil liability for negligence by failure to keep its streets free of unnecessary obstructions, untrimmed shrubs and bushes which blocked the view of motorists using its streets. *McDonald v. Village of Pinehurst*, 633.

MUNICIPAL CORPORATIONS — Continued**§ 30.17. Zoning Ordinances; Nonconforming Uses; Nature and Extent of Use or Vested Right**

Petitioners were entitled to complete their salvage yard by adding additional vehicles on the five acres of their ten-acre tract which they had cleared before a county zoning ordinance went into effect. *Stokes County v. Pack*, 616.

NARCOTICS**§ 3.1. Competency and Relevancy of Evidence Generally**

Evidence of prior drug-related arrests of other individuals at the building where defendant was arrested was admissible in a prosecution for maintaining a building for the purpose of keeping or selling a controlled substance. *S. v. Alston*, 707.

§ 3.2. Evidence Obtained by Search and Seizure

The State's failure to comply with an order directing the return of money seized from defendant's person upon his arrest for possession of cocaine did not preclude the State from presenting evidence of the money's existence. *S. v. Alston*, 707.

§ 4. Sufficiency of Evidence

Defendant could not be found guilty of conspiracy to traffic in cocaine where his alleged co-conspirator had been acquitted by another jury. *S. v. Green*, 127.

Evidence of defendant's intent to sell was shown by evidence that defendant was arrested in a room where police found 20 separate envelopes containing cocaine and that defendant had a large amount of cash on his person. *S. v. Alston*, 707.

Defendant could properly be convicted of intentionally maintaining a building for the purpose of keeping and selling a controlled substance even though defendant did not actually reside in the building. *Ibid.*

§ 4.3. Sufficiency of Evidence of Constructive Possession

The evidence was sufficient to permit the jury to infer defendant's constructive possession of cocaine found in a building over which defendant did not have exclusive control. *S. v. Alston*, 707.

§ 4.6. Instructions as to Possession

The trial court's failure to include the modifier "knowingly" in the second clause of an instruction on possession of cocaine was not error. *S. v. Fryar*, 474.

§ 4.7. Instructions as to Lesser Offenses

The trial court adequately instructed the jury on the distinction between the misdemeanor charge of "knowingly" maintaining a building for the purpose of keeping or selling a controlled substance and the felony charge when the violation is "committed intentionally." *S. v. Alston*, 707.

NEGLIGENCE**§ 2. Negligence Arising from the Performance of a Contract**

The trial court erred in submitting an issue as to negligent construction of a house to the jury. *Warfield v. Hicks*, 1.

NEGLIGENCE — Continued**§ 22. Pleadings**

An amendment to allege that defendants were negligent in misdirecting rescue personnel, though made more than two years after the deaths in question, would relate back to the filing of the original complaint where the complaint notified defendants that the alleged negligence arose out of drownings in defendants' pond. *Hawkins v. Houser and Pless v. Houser and Houser v. Hawkins*, 266.

§ 29. Sufficiency of Evidence

Plaintiff was not entitled to a directed verdict or a judgment n.o.v. in an action to recover damages for the alleged negligence of defendant in the transportation of certain cancelled checks which were destroyed in a plane crash. *Wachovia Bank and Trust Co. v. Southeast Airmotive*, 417.

§ 51.1. Negligence in Condition or Use of Lands; Attractive Nuisances and Injury to Children; Ponds

Defendants' maintaining of an unfenced, unposted pond on their rural land was not by itself negligence where drowning victims were capable of appreciating the danger of ice on the pond giving way. *Hawkins v. Houser and Pless v. Houser and Houser v. Hawkins*, 266.

The evidence in a wrongful death action was sufficient to present a jury question on the issue of defendants' negligence in making a call to rescue personnel suggesting that the rescuers travel to a pond where the decedents had fallen through the ice by a barricaded road when an unimpeded road was available. *Ibid.*

§ 59.3. Sufficiency of Evidence in Actions by Licensees

The evidence in a wrongful death case did not show contributory negligence by a 12-year-old boy who fell through the ice in defendants' pond and a person who attempted to rescue the boy. *Hawkins v. Houser and Pless v. Houser and Houser v. Hawkins*, 266.

PARENT AND CHILD**§ 1.5. Procedure for Termination of Parental Rights**

The trial court in a proceeding to terminate parental rights was not precluded from adjudicating that the child was neglected because of earlier district court orders concluding that the child was dependent. *In re Williamson*, 668.

§ 1.6. Termination of Parental Rights; Competency and Sufficiency of Evidence

The trial court's conclusion in a proceeding to terminate parental rights that respondent "acted in such a way as to evince a lack of parental concern for the child" and thus neglected the child was supported by the court's findings concerning his incarceration for the murder of the child's mother and his failure to contact the child for five years. *In re Williamson*, 668.

Where the court's order terminating parental rights was supported by a valid determination that the child was neglected, the court's reference to the statute relating to the failure to pay a reasonable portion of the child's costs of care was immaterial. *Ibid.*

The court's finding in an order terminating parental rights that petitioners plan to adopt the child was unnecessary where petitioners met other criteria for instituting a proceeding to terminate respondent's parental rights. *Ibid.*

The trial court was not required to recite that its dispositional finding that the best interest of the child required termination of respondent's parental rights was discretionary. *Ibid.*

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS**§ 17. Malpractice; Sufficiency of Evidence of Departing from Approved Methods or Standard of Care**

The trial court properly entered summary judgment for defendant in a medical malpractice action where plaintiffs failed to produce sufficient evidence of the applicable standard of care, of a breach of that standard of care, and that the damages suffered by them were proximately caused by defendant. *Evans v. Appert*, 362.

§ 20. Sufficiency of Evidence of Causal Connection between Malpractice and Injury

Plaintiff in a malpractice action failed to show the requisite causal connection between defendant doctor's failure to examine plaintiff's intestate and her death. *Turner v. Duke University*, 446.

PLEADINGS**§ 36.2. Restriction of Proof to Pleadings**

The trial court erred in an action arising from plaintiff's refusal to take a polygraph examination by concluding that the polygraph requirement for company police officer certification was without statutory authorization, did not meet case law requirements, and violated the North Carolina Constitution where neither the complaint nor the amended complaint presented those issues and there was no trial by implied consent. *Truesdale v. University of North Carolina*, 186.

PRIVACY**§ 1. Generally**

The trial court erred by concluding that a polygraph examination violated plaintiff's constitutional right to privacy where the questions asked bore no resemblance to the fundamental rights entitled to protection under the right to privacy. *Truesdale v. University of North Carolina*, 186.

PROCESS**§ 14.3. Service of Process on Foreign Corporation; Minimum Contacts Test; Sufficiency of Evidence**

Defendant California corporation was subject to personal jurisdiction in North Carolina under G.S. 1-75.4(5)(b). *Taurus Textiles, Inc. v. John M. Fulmer Co.*, 553.

§ 14.4. Service of Process on Foreign Corporation; Sufficiency of Evidence of Contacts within this State; Contract to Be Performed in this State

Defendant California corporation had insufficient minimum contacts to satisfy due process requirements where defendant contracted in California for the sale of textiles which were to be manufactured in North Carolina, shipped to South Carolina for finishing, and then shipped to defendant in California. *Taurus Textiles, Inc. v. John M. Fulmer Co.*, 553.

QUASI CONTRACTS AND RESTITUTION**§ 2. Actions to Recover on Implied Contracts Generally; Pleading Express and Implied Contract**

The trial court did not err in instructing the jury that it could not consider plaintiff's quantum meruit claim for expenses incurred on concrete construction

QUASI CONTRACTS AND RESTITUTION — Continued

jobs if it found an express contract between the parties. *Catoe v. Helms Construction & Concrete Co.*, 492.

RAPE AND ALLIED OFFENSES**§ 4. Relevancy and Competency of Evidence**

In a sexual offense and indecent liberties case in which the child victim refused to testify, the trial court erred in admitting a statement given by the victim to the investigating officer without making the specific findings and conclusions with regard to the unavailability of a witness required by Rule of Evidence 804(b)(5). *S. v. Benfield*, 228.

§ 4.3. Evidence of Character or Reputation of Prosecutrix

The trial court did not err in a prosecution for rape by not allowing cross-examination of the victim about sexual activity with her boyfriend. *S. v. Alverson*, 577.

§ 6.1. Instructions on Lesser Degrees of the Crime

The trial court in a prosecution for second degree sexual offense was not required to instruct on the lesser offense of attempt to commit a sexual offense. *S. v. Hensley*, 282.

§ 7. Sentence and Punishment

Any error in the court's instructions with regard to statutory rape was harmless where defendant received a life sentence for statutory rape which was to run concurrently with a life sentence imposed for burglary. *S. v. Barnes*, 484.

REFORMATION OF INSTRUMENTS**§ 7. Sufficiency of Evidence**

The trial court could properly reform a deed containing a description based upon an erroneous survey to reflect the original intent of the parties to convey approximately 12 acres by ordering the return to the grantors of the amount of acreage in excess of the erroneous survey. *Dettor v. BHI Property Co.*, 93.

RETIREMENT SYSTEMS**§ 5. Claims of Members**

A state employee's last day of service occurred on the date his sick and annual leave expired, rather than the day his position was vacated, and plaintiff beneficiary was not entitled to the statutory death benefit because the employee's death occurred more than ninety days after his last day of actual service. *Garrett v. Teachers' & State Employees' Retirement System*, 409.

ROBBERY**§ 1.2. Degrees**

A defendant indicted for armed robbery could properly be convicted of common law robbery as a lesser included offense. *S. v. Harris*, 526.

RULES OF CIVIL PROCEDURE

§ 4. Process

An undelivered summons can serve as a basis for a subsequent alias and pluries summons even though there has been no effort to deliver the original or subsequent summonses to a sheriff. *Smith v. Quinn*, 112.

§ 11. Signing and Verification of Pleadings

The evidence precluded a conclusion that defendant actively or improperly sought to keep a physician's existence from plaintiff in contravention of Rule 11. *Turner v. Duke University*, 446.

§ 12.1. Defenses and Objections; When and How Presented

Defendant waived his right to raise the defense of lack of in personam jurisdiction because he failed to raise it in his answer or motions but presented it for the first time on appeal. *Shores v. Shores*, 435.

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) should not be treated as a motion for summary judgment even though the trial court considers the contract which is the subject matter of the action. *Brooks Distributing Co. v. Pugh*, 715.

§ 15. Amended and Supplemental Pleadings

Defendant could not amend his complaint seeking a monetary judgment against two corporate defendants to include an action to enforce a lien against individuals who were not parties to the original complaint. *Lawyers Title Ins. Corp. v. Langdon*, 382.

The issue of permanent injury was tried by the implied consent of the parties even though defendant failed to allege permanent injuries in her complaint. *Smith v. Buckhram*, 355.

§ 26. Depositions in a Pending Action

The identities of experts who acquired knowledge of facts and formed opinions in anticipation of litigation or for trial but who are not expected to testify at trial are not discoverable under Rule 26. *Mack v. Moore*, 478.

Plaintiff's deposition of a physician did not violate an order requiring identification and deposition of expert witnesses prior to a certain date where the physician's testimony was limited to the facts regarding his diagnosis and treatment of plaintiff's wife and he was thus not an expert witness. *Turner v. Duke University*, 446.

Sanctions were not required to be imposed upon defendant for the taking of two depositions of physicians where there was no evidence that these depositions increased plaintiff's costs or were scheduled to distract plaintiff from preparing for trial. *Ibid.*

§ 56.2. Summary Judgment; Burden of Proof

The trial court did not abuse its discretion in granting defendant's motion for summary judgment before discovery was complete. *Evans v. Appert*, 362.

§ 60. Relief from Judgment or Order

Owners of condominium units who were adversely affected by a judgment lien in defendant's favor could not bring an action under Rule 60(b) for relief from the judgment since they were never made parties to the original suit but could only file an independent action directly attacking the judgment as it affected their interest. *Lawyers Title Ins. Corp. v. Langdon*, 382.

SALES

§ 6.1. Warranty of Merchantability

G.S. 99B-2(a) did not apply to an action by plaintiff for recovery of the purchase price of a crankshaft with a counterclaim by defendant for breach of implied warranty of merchantability where there was neither personal injury nor property damage. *Cato Equipment Co. v. Matthews*, 546.

§ 19. Breach of Warranty; Measure of Damages

The jury should have been allowed to determine whether the proper measure of damages for breach of contract and breach of warranty in the construction of a house was diminished value or cost of repairs based on its finding as to whether a substantial portion of the work would have to be undone. *Warfield v. Hicks*, 1.

§ 22. Actions for Personal Injuries Based on Negligence; Defective Goods or Materials; Manufacturer's Liability

Plaintiff's forecast of evidence was insufficient to show negligence by defendant manufacturer of "potato whitener" where plaintiff failed to show a defect in the product at the time it left defendant's plant. *Sutton v. Major Products Co.*, 610.

SCHOOLS

§ 13. Principals and Teachers

Plaintiff's claims based upon a criminal action resulting from a school principal's report to the DSS that plaintiff substitute teacher may have physically abused students while disciplining them were barred by G.S. 7A-550. *Davis v. Durham City Schools*, 520.

§ 13.2. Dismissal of Teachers

Defendant board of education failed to establish a justifiable decrease in the number of teaching positions for emotionally handicapped students because of decreased funding for the 1984-85 school year where the record does not explain how defendant reached the decision to reduce personnel. *Taborn v. Hammonds*, 302.

A city board of education followed its reduction in force policy in the midyear dismissal of plaintiff as a teacher of emotionally handicapped students after funds for the Exceptional Children Program were reduced. *Ibid.*

Defendant board of education was not equitably estopped from dismissing plaintiff as a teacher of emotionally handicapped students in the middle of the school year after funds were reduced. *Ibid.*

The evidence supported the trial court's decision that ECU acted properly in dismissing a tenured faculty member because of sexual harassment of female students. *In re Kozy*, 342.

SEARCHES AND SEIZURES

§ 13. Search and Seizure by Consent

A warrantless search of an outbuilding which defendant had been given permission to use for storage was lawful where defendant's sister who owned and also used the building voluntarily consented to the search. *S. v. Sturkie*, 249.

§ 18. Search and Seizure by Consent of Vehicle Owner

Officers lawfully searched a car allegedly driven by defendant from North Carolina to Missouri pursuant to a car dealer's consent while the car was at the dealer-

SEARCHES AND SEIZURES — Continued

ship for minor repairs where defendant had not finished paying for the car and the title and registration were still in the name of the dealership. *S. v. Mandina*, 686.

§ 26. Application for Warrant; Insufficiency of Showing of Probable Cause; Information from Informers

Property was unlawfully seized without a warrant from an outbuilding owned by defendant's sister where officers acted on the basis of a tip from a confidential informant whose reliability had not been established, and officers did not know at the time of the seizure that the goods were contraband. *S. v. Sturkie*, 249.

An affidavit containing week-old information and information from an informant not shown to be reliable was insufficient to show probable cause for issuance of a warrant to search defendant's residence for marijuana. *S. v. Beam*, 629.

SHERIFFS AND CONSTABLES

§ 4. Civil Liabilities to Individuals

The trial court did not err by granting a directed verdict for the City, the police department, and the police chief in a civil action for excessive force during an arrest. *Myrick v. Cooley*, 209.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

The Department of Human Resources' decision to deny claimant Medicaid disability benefits was not supported by substantial competent evidence and was affected by errors of law and procedure. *Henderson v. N.C. Dept. of Human Resources*, 527.

STATE

§ 4.2. Actions against the State; Sovereign Immunity; Particular Actions

The trial court erred in an action arising from plaintiff's refusal to take a polygraph examination by awarding monetary damages against the Vice Chancellor for Business Affairs at Winston-Salem State University and the Director of Campus Police at Winston-Salem State University in either their official or individual capacities. *Truesdale v. University of North Carolina*, 186.

§ 4.4. Actions against the State other than against Officers and DOT

Summary judgment should have been granted for the University of North Carolina and Winston-Salem State University based on sovereign immunity in an action arising from plaintiff's refusal to take a polygraph examination to be certified as a company police officer. *Truesdale v. University of North Carolina*, 186.

§ 5. Nature and Construction of Tort Claims Act in General

A bank's cross-claim against the State on the ground that the State's negligence concurred with that of a bank as the cause of the loss of bearer bonds which plaintiff had on deposit with the Commissioner of Insurance was a tort claim against the State which must be heard in the Industrial Commission. *Selective Ins. Co. v. NCNB*, 597.

STATE - Continued**§ 12. State Employees**

The State Personnel Commission acted arbitrarily and capriciously in denying petitioner a promotion to a position at a State university. *Joyce v. Winston-Salem State University*, 153.

The Department of Social Services did not act arbitrarily and capriciously in refusing to accept equivalent training and experience in the place of minimum educational requirements for an advertised position, and the statute providing for employment preference for veterans would not allow petitioner to sidestep the educational requirement. *Davis v. Vance County DSS*, 428.

STATUTES**§ 5.5. General Rules of Construction; Clear and Unambiguous Provisions**

An exception of the N.C. State Building Code allowing for a less fire resistant type of construction applied only to business and mercantile buildings of unlimited height but fewer than eight stories. *In re Appeal of Medical Center*, 107.

TAXATION**§ 15. Sales and Use Taxes**

A county's distribution of sales and use tax revenue on a per capita rather than an ad valorem basis pursuant to G.S. 105-472 did not violate equal protection, burden the right of interstate travel, or deprive out-of-state residents of their privileges and immunities under Art. IV, § 2 of the U.S. Constitution. *Town of Beech Mountain v. County of Watauga*, 87.

TORTS**§ 1. Nature and Elements of Torts**

Plaintiff's allegation that defendant insurer refused to pay an insurance claim for private duty nursing for plaintiff's now-deceased wife when it knew of plaintiff's vulnerable physical and mental condition was insufficient to state a claim for the intentional infliction of emotional distress. *Von Hagel v. Blue Cross and Blue Shield*, 58.

The tort of outrage is not recognized in this state. *Ibid.*

TRIAL**§ 11.1. Argument and Conduct of Counsel; Matters outside Evidence**

Defense counsel's jury argument which constituted a personal assault on plaintiffs and interjected religious values and criticism of the legal profession into an automobile negligence action was not supported by the evidence and was prejudicial error. *Corwin v. Dickey*, 725.

§ 43. Correction of Verdict by Jury

The trial court erred in excluding under Rule 606(b) jurors' evidence of a mistake in writing down the jury's verdict, but the court could not reform the verdict where the evidence of the alleged clerical error did not come to the attention of the court until several days after the jury was discharged. *Chandler v. U-Line Corp.*, 315.

The evidence of only two of the jurors that there was a mistake in the recording of the verdict was insufficient to support an order for a new trial. *Ibid.*

TRUSTS

§ 2.2. Removal of Trustee

An action by a guardian ad litem of a minor trust beneficiary to remove defendant as trustee was properly transferred to the civil issue docket where defendant answered claiming defenses of laches, estoppel, and unclean hands. *In re Trust Under Will of Jacobs*, 138.

The evidence was sufficient for the jury to conclude that defendant trustee's personal interests were in direct conflict with the trust beneficiaries' interests so that breach of loyalty could be found. *Ibid*.

§ 6. Authority and Duties of Trustee

A trustee's breach of trust subjects him to personal liability, and the trial court could properly deny defendant trustee any commissions and could require defendant to pay costs, witness fees, and attorney's fees as damages. *In re Trust Under Will of Jacobs*, 138.

§ 13.3. Creation of Resulting Trusts; Implied Contracts

The trial court properly established a resulting trust in defendant wife's favor in a condominium where plaintiff's grandmother gave defendant a check for \$10,000 in her maiden name which she deposited into a separate account, and defendant subsequently wrote plaintiff a check for \$10,000 which he used to purchase the condominium. *Tiryakian v. Tiryakian*, 128.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The trial court did not err by finding as a matter of law that defendants had violated G.S. 75-1.1(a) by their tortious interference with the business relations of plaintiff. *McDonald v. Scarboro*, 13.

Defendant did not engage in an unfair trade practice by failing to notify plaintiff that it was seeking alternatives to plaintiff's contract to provide shuttle service between defendant's plant and a warehouse. *Tar Heel Industries v. E. I. duPont de Nemours*, 51.

The trial court properly dismissed plaintiff's claim for unfair and deceptive trade practices in the denial of an insurance claim. *Von Hagel v. Blue Cross and Blue Shield*, 58.

An alleged representation by defendant builder that the use of beetle infested decorative beams in a house being constructed for plaintiffs would pose no problems other than a little sawdust did not constitute an unfair trade practice. *Warfield v. Hicks*, 1.

The trial court did not err by dismissing defendants' counterclaim for unfair and deceptive trade practices where the thrust of defendants' claim was that plaintiff submitted low bids for contracts and then later overcharged its customers, and engaged in an ostensible effort to sell its business to defendants for the purpose of delaying defendants' opening of a business in plaintiff's business area and preventing defendants from bidding on a lucrative contract. *Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales and Service*, 539.

UNIFORM COMMERCIAL CODE

§ 12. Implied Warranties of Merchantability

Plaintiff grocery store employee was disqualified by G.S. 99B-2(b) from being a claimant on an implied warranty of merchantability theory against a manufacturer of potato whitener used by plaintiff in her work. *Sutton v. Major Products Co.*, 610.

UNIFORM COMMERCIAL CODE — Continued

Plaintiff's claims against defendant distributors of a potato whitener for breach of implied warranty of merchantability were properly dismissed for insufficient evidence. *Ibid.*

§ 14. Implied Warranties; Fitness for Particular Purpose

The evidence presented a jury question as to whether leakage in a refrigerator ice maker was due to the design of a valve or whether it was caused by overtightening of the valve at the refrigerator manufacturer's plant, and the trial court thus properly denied the valve manufacturer's motion for directed verdict on a claim for breach of warranty of merchantability of the valve. *Chandler v. U-Line Corp.*, 315.

§ 20. Performance; Acceptance or Rejection of Goods by Buyer; What Constitutes Acceptance

The trial court did not err by concluding that plaintiff had breached its implied warranties of fitness and in allowing a setoff by defendant of the purchase price in an action for recovery of the purchase price for a crankshaft with a counterclaim by defendant for breach of implied warranties. *Cato Equipment Co. v. Matthews*, 546.

§ 37.7. Purchase of Investment Securities

Plaintiffs' allegation in an action for breach of contract to purchase shares of stock that the amount of damages sought "represented the aggregate contract purchase price" sufficiently stated a claim to recover the purchase price under G.S. 25-8-107, and plaintiffs were not limited to recovery of the difference between fair market value and unpaid contract price. *Atkins v. Mitchell*, 730.

In an action to recover damages for breach of an agreement to purchase shares of stock, a genuine issue of material fact existed regarding whether efforts at reselling the securities would be unduly burdensome or whether there was a readily available market for their resale. *Ibid.*

VENDOR AND PURCHASER**§ 1.4. Exercise of Option**

Where a repurchase agreement was not specific as to the proper tender, notice to the optionees that plaintiffs were exercising the option through a phone call and letter from their attorney to defendants amounted to a proper tender. *Rice v. Wood*, 262.

§ 6.1. Liability of Vendor of New Structure; Negligence in Construction

The trial court erred in submitting an issue as to negligent construction of a house to the jury. *Warfield v. Hicks*, 1.

VENUE**§ 2.1. Residence of Parties as Fixing Venue; Actions against Corporations**

Wake County was the proper venue for an action between plaintiff foreign corporation and defendant resident of Duplin County where plaintiff conducted business and maintained a regional office in Wake County. *Travelers Indemnity Co. v. Marshburn*, 271.

WILLS**§ 28.4. Determining Testator's Intent from Language of Will and Circumstances Surrounding Execution**

The trial court's order terminating a life estate created by the will of respondent's deceased wife was remanded for entry of judgment in favor of respondent based on interpretation of the will's language. *Cummings v. Snyder*, 565.

WITNESSES**§ 7. Refreshing Memory**

The trial court did not abuse its discretion in an action to remove respondent as executor of an estate by refusing to strike testimony of the clerk of court based on a written memorandum concerning services performed by respondent. *Matthews v. Watkins*, 640.

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